The Law Commission

(LAW COM. No. 33)

FAMILY LAW
REPORT ON NULLITY OF MARRIAGE

Laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965

Ordered by The House of Commons *to be printed* 3rd *December* 1970

LONDON
HER MAJESTY'S STATIONERY OFFICE
8s. 0d. [40p] net

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. The Commissioners are—

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*
Mr. Claud Bicknell, O.B.E.
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Mr. Neil Lawson, Q.C.
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THE LAW COMMISSION

Item XIX of the Second Programme

FAMILY LAW

To the Right Honourable the Lord Hailsham of Saint Marylebone,
Lord High Chancellor of Great Britain

INTRODUCTION

General

1. In accordance with Item XIX of the Second Programme of Law Reform of the Law Commission, we have made an examination of the law of nullity of marriage. In June 1968 we issued our Working Paper No. 20 setting out the result of this examination and our provisional conclusions as to the reforms which would be desirable in that field of the law. It is our practice, when considering proposals for law reform, to consult as widely as possible and our Working Paper was circulated to Government Departments, members of the judiciary, legal and religious organisations, organisations and societies concerned with various aspects of marriage, and to many lawyers and other individuals. We wish to acknowledge the great assistance which we have derived from their views and comments. We are particularly grateful to the Medico-Legal Society which held a public meeting in November 1968 to discuss our Working Paper. Most helpful contributions were made in discussion and we were encouraged to think that our tentative proposals were likely to receive general support.

2. We should emphasize that the present study is concerned only with the English internal law of nullity. We do not here deal with the circumstances in which and the grounds on which the English courts may annul a marriage because of a failure to comply with the law of the place where it was celebrated or the parties' personal law. These and other conflicts of law problems will be the subject of a separate study.

3. In Working Paper No. 20 we reviewed the present law of nullity and the main conclusion we reached was that the present distinction between valid, void and voidable marriages corresponded to factual differences in the situation of the parties which call for different relief from the courts. The difference between the three types of marriage may be summarised thus:

(*a*) A valid marriage is one which is in no sense defective and is, therefore, binding on the parties (and on everyone else); it can only be terminated by death or by a decree of divorce, which decree acknowledges the existence of a valid marriage and then proceeds to put an end to it.

(*d*) A void marriage is not really a marriage at all, in that it never came into existence because of a fundamental defect; the marriage is said to be void *ab initio*; no decree of nullity is necessary to make it void and parties can take the risk of treating the marriage as void without

obtaining a decree. But either of the spouses or any person having a sufficient interest in obtaining a decree of nullity may petition for a decree at any time, whether during the lifetime of the spouses or after their death. In effect, the decree is a declaration[1] that there is not and never has been a marriage.

(*c*) A voidable marriage is a valid marriage unless and until it is annulled; it can be annulled only at the instance of one of the spouses during the lifetime of both, so that if no decree of nullity is pronounced during the lifetime of both spouses the marriage becomes unimpeachable as soon as one of the spouses dies.

4. In many Civil Law countries marriages which we would regard as void are treated as voidable in the sense that a marriage once formally celebrated cannot be disregarded until it has been set aside.[2] This seems to be based on the importance which those countries place on official records. The English view, however, is that registration of a marriage merely records the celebration of the marriage and affords no guarantee of its validity. To require legal proceedings to be instituted before parties could regard themselves as free from a marriage which was palpably invalid because, for example, one party was already married to another or was under the age of 16, would, in our view, add needlessly to the expense to the parties and to the public. Hence, we maintain the view, shared by those whom we consulted, that this threefold distinction should be maintained although, as will appear, we take the view that some defects which at present are regarded as making the marriage wholly void should merely make it voidable. In these cases there will initially be such serious doubts whether or not the marriage is valid as to make a judicial decision essential. We also discuss later[3] whether some or all of the grounds on which marriages at present are treated as voidable should instead be grounds for divorce.

5. **References and Abbreviations**

The following abbreviations will be used:—

Gorell Commission	Report of the Royal Commission on Divorce and Matrimonial Causes 1912 (Cd. 6478).
Morton Commission	Report of the Royal Commission on Marriage and Divorce 1956 (Cmd. 9678).
Church Report	Report of a Commission appointed by the Archbishops of Canterbury and York, entitled "The Church and the Law of Nullity of Marriage" (S.P.C.K. 1955).
Putting Asunder	Report of a group appointed by the Archbishop of Canterbury (S.P.C.K. 1966).

[1] It has, however, certain differences from a normal application for a declaration, notably that ancillary financial provision may be ordered after a decree of nullity but not after a mere declaration: see para. 31 below.

[2] See *Report on the Marriage Law of Scotland* (Kilbrandon Report) (1969); Cmnd. 4011, para. 80.

[3] See paras. 21–28.

6. **Summary of the Grounds of Nullity**

The grounds[4] on which a marriage is void are:

(*a*) invalid ceremony of marriage;

(*b*) non-age;

(*c*) prohibited degrees (*i.e.*, consanguinity or affinity);

(*d*) prior existing marriage;

(*e*) lack of consent (whether through duress, mistake or unsoundness of mind).[5]

Grounds (*a*) to (*c*) are governed by the Marriage Act 1949. Grounds (*d*) and (*e*) are grounds on which a marriage was void in ecclesiastical law, which became a part of our matrimonial law by virtue of section 22 of the Matrimonial Causes Act 1857, now replaced by section 32 of the Supreme Court of Judicature (Consolidation) Act 1925.

7. The grounds on which a marriage is voidable are:

(*a*) incapacity of either party to consummate the marriage;

(*b*) the respondent's wilful refusal the consummate the marriage;

(*c*) unsoundness of mind, mental disorder or epilepsy of either party at the time of the marriage;

(*d*) that the respondent was at the time of the marriage suffering from a venereal disease in a communicable form;

(*e*) that the respondent, at the time of the marriage, was pregnant by a man other than the husband.

Ground (*a*) is derived from ecclesiastical law. Grounds (*b*) to (*e*) are statutory and are governed by section 9 of the Matrimonial Causes Act 1965.

8. Collusion, although it will no longer be a bar to suits of divorce after 1st January 1971, is still a bar to a nullity suit on any ground. In addition, approbation of the marriage by the petitioner is a bar to a suit to annul a voidable marriage. Furthermore, a decree on grounds (*c*), (*d*) or (*e*) of paragraph 7 cannot be granted unless the court is satisfied that (i) at the time of the marriage the petitioner was ignorant of the facts alleged, (ii) proceedings were instituted within a year from the date of the marriage, and (iii) marital intercourse with the consent of the petitioner did not take place after the petitioner discovered the existence of grounds.

9. We set out in Appendix B the figures for nullity petitions filed and decrees granted during the years 1964–1969. As will be seen, the number of petitions annually has been under 1,000 and the number of decrees under 900. By way of comparison, in 1969 there were 60,134 petitions for divorce and 54,151 decrees nisi. Appendix B also shows the number of petitions and decrees of nullity on the various grounds; as will be seen, incapacity and wilful refusal to consummate are overwhelmingly the most commonly used grounds.

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[4] The position of two persons of the same sex going through a ceremony of marriage with each other is considered in paras. 30–32.

[5] There are, however, recent *dicta* to the effect that lack of consent may make a marriage voidable and not void; see this point discussed in "Void and Voidable Marriages" by Dimitry Tolstoy, Q.C., (1964) 27 M.L.R. 385.

10. Before examining in detail each of the grounds of nullity, we consider whether the dividing line between void, voidable and valid marriages is properly drawn and whether there should be any additional grounds either for voidness or voidability and what should be the general bars to nullity. This can be reduced to five questions:

(1) Should lack of consent make a marriage voidable instead of void?

(2) Should an under-age marriage be merely voidable or should it be void but ratifiable?

(3) Should all or some types of voidable marriages be regarded as valid and be terminated only by divorce if they have broken down irretrievably?

(4) Should there be additional grounds?

(5) What should be the general bars to a nullity decree?

I—SHOULD LACK OF CONSENT MAKE A MARRIAGE VOIDABLE INSTEAD OF VOID?

11. It was a doctrine of canon law[6] which was adopted by English ecclesiastical law that a marriage void on the ground that there was no consent at the time of the marriage could be ratified by a consent voluntarily given subsequently, whereupon the consent was deemed to relate back to the time of the marriage. The absence of consent could result from inability to consent because of unsoundness of mind or from being temporarily deprived of freedom of choice by compulsion or through a mistake or other circumstances. In the former case the void marriage could be ratified during a lucid interval or when sanity returned[7] and, in the latter case, when the compulsion or other circumstances were removed.[8] By the Matrimonial Causes Act 1857, section 22 and the Supreme Court of Judicature (Consolidation) Act 1925, section 32,[9] ecclesiastical law is administered by the Divorce Court in nullity proceedings and the doctrine of ratification has been acknowledged in modern law.[10]

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[6] Decretals of Gregory IX, Bk. IV, tit. 7, Ch. 2, (1227).

[7] *Mrs Ash's Case* (1702) Freeman C.C. 259; Shelford, *Law of Marriage and Divorce*, 1841, p. 197. See also *Ellis* v. *Bowman* (1851) 17 L.T. (O.S.) 10.

[8] Swinburn, *Treatise of Espousals*, 1686, p. 38; Ayliffe, *Parergon*, 1726, p. 361; Poynter, *Doctrine and Practice of the Ecclesiastical Court*, 1824, p. 138; Roger, *Ecclesiastical Law*, 1841, p. 564; Shelford, *Law of Marriage and Divorce*, 1841, p. 214.

[9] *Baxter* v. *Baxter* [1948] A.C. 274, 285; *Matalon* v. *Matalon* [1952] P. 233, 237.

[10] *Valier* v. *Valier* (1925) 133 L.T. 830 ("I must consider whether there has been anything in the petitioner's subsequent conduct which amounted to a ratification. The case would be a very different case if, after the petitioner realised that a marriage ceremony had been performed, the parties had proceeded to take each other as man and wife".) *McLarnon* v. *McLarnon* (1968) 112 Sol.J. 419 ("The marriage had been consummated but that was not a bar to an allegation of duress; it was no more than evidential weight and not a ratification or estoppel. Mere sexual intercourse after a marriage had been entered into *ex hypothesi* under duress would not negative a plea of duress.") The doctrine of ratification is purely canonical in origin and cannot be explained on logical grounds. In the words of Lord O'Brien, C. J., in *Ussher* v. *Ussher* [1912] 2 I.R. 455, 480: "As was asked with much emphasis by counsel during the argument, how could the marriage be validated if it was altogether void? Such a proposition, it was contended, finds no support from 'reason'. I am afraid there are many things lying at the root, at the foundation, of the Christian religion, mysteries of faith, for an elucidation of which we should appeal to 'reason' in vain."

12. The doctrine of ratification is in effect the application of the doctrine of approbation to marriages void for absence of consent so that the status of such marriages is in this respect similar to the status of voidable marriages, that is to say, in both cases the parties themselves can by their own action prevent the marriage in question from being annulled. Whereas a bigamous marriage or one within the prohibited degrees is, both in theory and in practice, void without the necessity of a decree of nullity and can never be ratified, a marriage alleged to be void on the ground of lack of consent—whether due to duress, mistake or insanity—cannot in practice be treated as a void marriage without the court first investigating the circumstances and making a decree, so that the transfer of such a marriage from the void into the voidable category of marriages would not create hardship to the parties. The case for such transfer is strengthened by the doctrine of ratification which enables a party to decide for himself whether he wishes the marriage to take effect; why, if the parties wish their marriage to be valid, should they run the risk of having the marriage impeached by third parties?

13. The overwhelming view of those whom we consulted on our Working Paper No. 20 and who sent us comments on it was that lack of consent through duress or mistake should render the marriage voidable, and not void, and we agree with this view. This will, incidentally, have the desirable consequence of wholly absorbing "ratification" within "approbation"; as already pointed out in this context "ratification" appears to mean much the same but the use of a separate expression, though understandable so long as absence of consent was regarded as making a marriage void (as distinct from voidable), is a potential source of confusion.

14. In Working Paper No. 20 we said that, while the question whether lack of consent due to insanity at the time of marriage should render the marriage void or voidable was a difficult one,[11] we thought on balance that when the lack of consent was due to this cause the marriage should continue to be void. Our reason for this view was that a ceremony, where one of the parties is in this mental state and does not understand what he is doing, is meaningless. However, on further consideration and taking into account the views expressed by those whom we consulted, we have come to the conclusion that this type of unsoundness of mind, like other types of mental disorder or lack of consent, should render the marriage voidable and not void.[12] Our reasons may be summed up as follows:

(*a*) Marriages are voidable under the Matrimonial Causes Act 1965, section 9, on the ground of unsoundness of mind or mental disorder[13] and the distinction between unsoundness of mind which makes a

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[11] In both Australia and New Zealand absence of consent, whether by reason of insanity or due to mistake or compulsion, makes the marriage void; in most states of the U.S.A. absence of consent, for either reason, makes the marriage voidable; in South Africa mental incapacity makes the marriage void and lack of consent due to mistake or compulsion makes it voidable.

[12] Third parties with a sufficient interest in obtaining a declaration of nullity may petition for nullity of a void marriage (see para. 87) and our proposal to make lack of consent a ground for rendering a marriage voidable (and not void) would result in the elimination of this right of third parties. We think, however, that, for the reasons stated in this paragraph this is not of itself sufficient objection to our proposal—if indeed it amounts to an objection at all.

[13] See para 69.

marriage voidable and unsoundness of mind which makes a marriage void is a source of confusion. It may be difficult for a court to draw the line between unsoundness of mind depriving a person of mental capacity to understand the nature of marriage and unsoundness of mind falling within section 9;[14] the position under the present law, which makes the marriage void if it falls into the first category and voidable if it falls into the second category, seems artificial.

(*b*) It also seems artificial that the marriage of a person subject to a recurrence of insanity should be absolutely void if the celebration of the marriage coincides with a period of aggravation of the illness depriving a person of the requisite degree of understanding, but be valid, though voidable, if such aggravation takes place the day after the celebration.

(*c*) A ground of nullity which cannot be relied upon until after a court trial (see paragraph 12) should render the marriage voidable, as in such a case the marriage is, for practical purposes, valid unless successfully challenged.

(*d*) There are marriages of insane persons which benefit such persons. If, for instance, a woman marries a man of unsound mind and is willing to look after him and her care and presence are beneficial to the man, we can find no good reason why the marriage should be null and void or why third parties should be allowed to interfere with it by having it declared to be a nullity.

(*e*) Under existing law a third party can, with leave of the court, institute nullity (and divorce) proceedings on behalf of the insane person as his next friend;[15] there is, therefore, a safeguard in the event of its being in the interest of the insane person to obtain a decree of nullity, the insane person being himself unable to take this step because of his mental condition.

15. We, therefore, recommend that absence of consent whether due to duress, mistake or unsoundness of mind at the time of marriage should render a marriage voidable and not void.

II—SHOULD AN UNDER-AGE MARRIAGE BE MERELY VOIDABLE OR RATIFIABLE?

16. It has been proposed to us that a marriage in which one spouse is, or both spouses are, under the age of sixteen at the time of marriage, should be either voidable or ratifiable, instead of being void as is the case under existing law.[16] The distinction between these two proposals is: if the under-age marriage were made voidable, such a marriage would be valid unless it were annulled; if it were made ratifiable, it would be void unless ratification took place after attaining the appropriate age.

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[14] We shall recommend amendment of section 9 (see paras. 70 *et seq.*), but this does not affect the point we are making here.

[15] Mental Health Act 1959, ss. 102, 103.

[16] In some countries there is provision for authorising marriage below the statutory age and below the age of consent to sexual intercourse: para. 48, fn. 80.

17. The arguments in favour of making an under-age marriage voidable (instead of void) may be summarised as follows:

(*a*) If the parties marry genuinely believing that they are both of marriageable age, it is hard on them if subsequently—perhaps many years later—they discover that their marriage is void. The hardship to one party may be still greater if the other has led him or her to think that the other is of marriageable age. It may be possible for the parties, on discovering the true facts, to marry and thereby rectify the position, but this possibility would not be available if they had separated and one or other refused to marry or if one or both were dead; in such event children and other persons might be adversely affected.

(*b*) If parties have lived together for many years believing their marriage to be valid, it is wrong to let a third party, who has a financial interest in establishing the invalidity of the marriage, challenge it on the ground that, through some error (as where, for instance, the wife was an immigrant with no birth certificate), a party was under sixteen at marriage.

(*c*) Society should not interfere with a marriage which is valid from the ceremonial aspect unless it is contrary to public policy to regard the particular marriage as valid: it is difficult to see why it should be contrary to public policy to treat as valid a marriage which both parties, now of the age of marriage, want to preserve.

18. The contrary arguments may be summarised as follows:

(*a*) The marriage could not be annulled if it had been approbated. Where both parties know that one or other is, or both are, under-age when entering into the marriage, both parties would normally be approbating the marriage, so that no decree of nullity would be possible and the marriage would be for all time valid. On the other hand, if one or both of the parties entered into the marriage innocently believing that both parties were over sixteen, there could not be approbation by the innocent party until he or she discovered the mistake. Therefore, in some cases a petition might be presented many years after the marriage. The result would be to create that very uncertainty as to the status of the marriage which should be eliminated. (This difficulty could, however, be overcome if the under-age marriage were made subject to the three-year time-limit for the institution of proceedings which we shall suggest should be applicable to certain petitions for nullity: see paragraphs 79, 80).

(*d*) The substantial objection to making an under-age marriage voidable is of a social nature. Does society think it right that an age should be fixed below which, as a matter of public policy, no person should be able to marry, or does it hold the view that if two people nevertheless contrive to be married below that age, they should be left free to decide whether their marriage is to be valid or void?

(*c*) Parliament has fixed the minimum age for marriage at sixteen. Until 1929 the minimum age was fourteen for a boy and twelve for a girl, the reason for such ages being apparently the medieval conception that at those respective ages children reached the age when

they became capable of sexual intercourse and evil would ensue if they were not then able to marry.[17] The Age of Marriage Act 1929[18] raised the minimum age of marriage to sixteen for both sexes, this age being chosen because sexual intercourse with a girl under sixteen was (and still is) a criminal offence and it was considered wrong for marriage to take place at an age earlier than the age at which the girl could lawfully consent to sexual intercourse. The suggestion that an under-age marriage should be voidable (and not void) was rejected for this reason. To quote from the speeches in Parliament during the debates on the 1929 Act:

> "Everybody will agree that something should be done to prevent the cloak of marriage being thrown over an act which is declared to be a crime and punishable under our law . . . It is a simple thing to say that we will not, from this day forward, countenance the marriage of a girl under the age of sixteen when we say that the ordinary act [of sexual intercourse] with her under the age of sixteen is an offence and is a criminal offence and that is not to be made an innocent offence merely by marriage . . . All that the Bill is attempting to do is to enact that that which is a criminal offence should not be rendered an act for which no punishment or penalty can be imposed provided there is marriage . . . If a thing is wrong under the age of sixteen, how can it become right if it is cloaked by a marriage?"[19]
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> "That a man may marry a girl and may under the cloak of marriage commit against her what we all now accept as a definite wrong against the girl's immaturity and against her inability to undertake the terrific responsibility of relations with a man . . .is to destroy the whole foundation of the measure."[20]
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> "We are satisfied that to leave the law as it stands, that under the age of sixteen this offence is a crime and yet marriage should be legal is quite indefensible. We do not think it is possible to allow the law to continue as it is now that this illegal act should be condoned by marriage."[21]

(*d*) In 1967 the Latey Committee was unanimously of opinion that it is "essential that the minimum age for marriage and the age of consent to sexual intercourse should be the same".[22]

(*e*) It may seem hard on innocent persons who after years of marriage discover that the marriage is void because a party was under age at the time of marriage, but this result flows from the law's requirements as to the observance of fundamental conditions as a foundation for a valid marriage and its refusal to treat cohabitation as equivalent to

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[17] 72 H.L. Deb., col. 961.
[18] Repealed and re-enacted in the Marriage Act 1949, s.2.
[19] 72 H.L. Deb., cols. 1211, 1213; Vol. 73, cols. 414, 415 (Marquis of Reading).
[20] *Ibid.*, Vol. 72, col. 1209 (Lord Buckmaster).
[21] 72 H.L. Deb., col. 969 (Marquis of Salisbury on behalf of the Government). Nevertheless, sexual intercourse here between a man and his wife who is under sixteen is not ***unlawful*** if their marriage was lawful both in the country where it was celebrated and where they were domiciled: *Alhaji Mohamed* v. *Knott* [1969] 1 Q.B. 1.
[22] *Report of the Committee on the Age of Majority* (1967); Cmnd. 3342, para. 177.

matrimony. The parties are in a similar predicament where after years of "married life" the parties discover that their marriage is void because a former spouse was still alive at the date of marriage.

19. On the whole we think the arguments against the proposal should prevail. The alternative proposed to us was that an under-age marriage should become valid by ratification if the parties cohabit until the age of majority.[23] We reject this proposal also. Our main reasons for its rejection are:

(*a*) To allow ratification of an under-age marriage after reaching the age of majority would be placing in the way of determined young people a temptation to get married under age in the knowledge that they have it in their power to validate the marriage as soon as they reach the requisite age.[24]

(*b*) Allowing an under-age marriage to be subsequently validated would be tantamount to condoning the criminal offence of having sexual intercourse with a girl under sixteen. If the police know that the girl was married under sixteen and that the man has had sexual intercourse with her, are they to prosecute or to hold their hand until it is known whether the marriage has been ratified or not? Is marriage to a girl under sixteen to be one way of getting round the criminal law?

(*c*) If a man who had married a girl under sixteen were prosecuted and convicted of having unlawful sexual intercourse with her and then, later on, his marriage to her were ratified, the anomalous result would follow that he had committed a crime by having sexual intercourse with his own wife.

(*d*) Under the proposal the marriage would remain void unless the parties cohabited until majority. It follows that the marriage would have to be treated as a void marriage, unless and until ratification was established by some procedure, presumably in court, which would provide for trial of the issue where necessary. If so, the parties could equally well get married again. The only hardship would be where one or both parties died without discovering the defect, but this applies to all cases of defects, for example, honest but mistaken belief that a former marriage has been validly dissolved by a foreign decree.

(*e*) Since the marriage would be void between the date of marriage and attainment of majority, the irate parent (or anyone else with a sufficient interest) could during that period obtain a decree of nullity as of right. What is the legal position to be if the parties continue to cohabit till majority notwithstanding the decree?

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[23] In Scotland a marriage can be presumed from cohabitation and repute, so that parties who were, or one of whom was, under sixteen at marriage may be able to turn their void union into a lawful marriage by continuing to cohabit after reaching that age. This Scottish rule must be distinguished from ratification, as the marriage, if it comes into existence at all, does not ratify or validate any marriage ceremony, but comes into existence independently of any such ceremony. This contrasts with the rule of English law that a marriage cannot come into being without a valid ceremony as its foundation. The Scottish rule is of general application, operating in respect of any couple who cohabit in appropriate circumstances and it would be anomalous, and we think wrong, to introduce the rule into English law in order just to deal with under-age marriages.

[24] The provision of the French and Italian Civil Codes whereby the wife's pregnancy validates an under-age marriage appears to be an even worse temptation to headstrong young people determined to evade the law.

(*f*) How is ratification to be proved if years later, after both the parties are dead, a child of theirs discovers that one of the parties was under sixteen at marriage and all that is known is that they lived together for a few years (but not precisely how long) and then parted?

20. We, therefore, recommend that a marriage where one party is, or both parties are, under sixteen years of age should not be either voidable or ratifiable, but should continue to be void.

III—SHOULD ALL OR SOME TYPES OF VOIDABLE MARRIAGE BE REGARDED AS VALID AND BE TERMINATED ONLY BY DIVORCE?

21. Prior to the Reformation all marriages were either valid or void and the concept of a voidable marriage did not exist; a nullity decree could be obtained from the Ecclesiastical Courts declaring a marriage void on any ground (including impotence) at any time by any person with a sufficient interest. After the Reformation marriage ceased to be a sacrament and the Common Law courts felt free to interfere with the Ecclesiastical Courts' power to annul marriages. They conceded that certain marriages, for example, where there was a prior existing marriage or lack of consent, were no marriages at all and refrained from interfering in such cases, but in the case of pre-contract,[25] marriage within the prohibited degrees or impotence they used the royal writ of prohibition to forbid the Ecclesiastical Court from annulling marriages after the death of one of the spouses. Hence, marriages void on one of those grounds became unimpeachable immediately one of the spouses died and in time such marriages came to be regarded as valid unless annulled during the lifetime of both spouses. Pre-contract was abolished by Lord Hardwicke's Act 1753, and marriages within the prohibited degrees were made void by the Marriage Act 1835, so that thereafter impotence remained the only ground on which a marriage was voidable. A voidable marriage which was annulled was treated as being void *ab initio* and the issue as illegitimate. The decree, in the case of both a void and voidable marriage, was and still is the same; it declares the marriage "to have been and to be absolutely null and void to all intents and purposes in the law whatsoever". This wording is misleading in the case of a voidable marriage, but is understandable on historical grounds.

22. The result of the historical development of the law was that the status of a voidable marriage—whether it was valid or void—and the status of the issue were in suspense until the death of one of the parties. Though uncertainty as to the status of the issue has been removed by legislation,[26] uncertainty as to the status of the marriage itself still remains. So long as a decree of nullity has not been pronounced, the marriage is a valid subsisting marriage and the spouses have the status of husband and wife,[27] but a decree of nullity, when made, is retroactive and amounts to a declaration that there has not

[25] If A agreed to marry B and then married C without the agreement to marry B having been rescinded with B's consent, A's marriage to C was void on the ground of pre-contract.

[26] See Matrimonial Causes Act 1965, s.11, which enacts that the issue of a voidable marriage which is annulled are legitimate.

[27] *Re Wombwell's Settlement* [1922] 2 Ch. 298; *Fowke* v. *Fowke* [1938] Ch. 774; *De Reneville* v. *De Reneville* [1948] P. 100, C.A.

been a marriage.[28] Thus, an ante-nuptial settlement in consideration of a contemplated valid marriage fails on a decree of nullity being pronounced.[29] But it has, nevertheless, been held that a post-nuptial settlement or other transaction effected on the basis that there is a valid marriage in existence at that time cannot be set aside upon the marriage being annulled.[30] Similarly, the marriage being valid until annulled, the wife automatically acquires the husband's domicil and, on the marriage being annulled, she retains it until she acquires another of her own volition.[31] If a party to a voidable marriage remarries during the lifetime of the other party without a decree of divorce or nullity having been made, that remarriage is clearly bigamous and void; but if the voidable marriage is subsequently annulled, it is unclear whether the retroactive effect of the decree wipes out, as it were, the voidable marriage and renders the remarriage valid because, as a result of the decree, no prior marriage was in existence at the time of the remarriage. In *Wiggins* v. *Wiggins*[32] it was held that the remarriage remained bigamous notwithstanding the annulment of the prior marriage. But there is the earlier Northern Irish case of *Mason* v. *Mason*[33] where on similar facts the remarriage was held valid, and in *Newbould* v. *A.G.*[34] Lord Merrivale's decision under the Legitimacy Act 1926 shows that he would have found the remarriage to have been valid. Moreover, the court in *Wiggins* v. *Wiggins*[32] purported to hold as it did because of what the Court of Appeal had said in *De Reneville* v. *De Reneville*.[35] But the Court of Appeal was not giving a decision on the retrospective effect of the decree, which, in that case, had not been made; nor was any doubt cast by the Court of Appeal on *Newbould* v. *A.G.*[34] If ultimately the reasoning in *Mason* v. *Mason*[33] should be preferred to that in *Wiggins* v. *Wiggins*,[32] then there would follow the odd consequence that the validity or invalidity of the remarriage depends on the date of the proceedings to annul the first marriage.[36]

23. The present law in relation to the consequences of a decree of nullity of a voidable marriage is uncertain and inconvenient. It should clearly be improved and one way of doing so would certainly be to absorb all grounds of nullity of voidable marriages into the grounds of divorce. If this were done,

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[28] *Dormer* v. *Ward* [1901] P. 20, C.A.; *Re Eaves* [1940] Ch. 109, C.A.; *Re Adams* [1951] Ch. 716. Thus, a person whose voidable marriage is annulled has not been married: *Re Rodwell* [1969] 3 W.L.R. 1115; and a widow who remarries and whose voidable remarriage is annulled reverts to her status of widowhood: *Re Dewhirst* [1948] Ch. 198; *Re d'Altroy's Will Trusts* [1968] 1 W.L.R. 120.

[29] *Re Wombwell's Settlement*, *supra*; *Clifton* v. *Clifton* [1936] P. 182. The Divorce Court can, under the Matrimonial Causes Act 1965, s.17(1), vary the settlement by directing that it does not lapse.

[30] *Re Eaves*, *supra* (transaction between two beneficiaries under a trust); *Fowke* v. *Fowke*, *supra* (separation agreement); *Adams* v. *Adams* [1941] 1 K.B. 536, C.A. (same); *Re Dewhirst*, *supra* at 205; *Re d'Altroy's Will Trusts* [1968] 1 W.L.R. 120.

[31] *De Reneville* v. *De Reneville*, *supra* at 111, 112.

[32] [1958] 1 W.L.R. 1013.

[33] [1944] N.I. 134. The Court in *Wiggins* v. *Wiggins* declined to follow *Mason* v. *Mason*, notwithstanding that the judgment of Andrews, C. J. in that case had been described by Bucknill, L. J. in *De Reneville* v. *De Reneville* [1948] P. 100, 120, as a "considered and helpful judgment".

[34] [1931] P. 75. No reference to this was made in the judgment in *Wiggins* v. *Wiggins*.

[35] [1948] P. 100, C.A.

[36] This seems to be the position in the case of a criminal prosecution for bigamy: see the wording of the Offences against the Person Act 1861, s.57, and *Mason* v. *Mason* [1944] N.I. 134, 164–165.

all the present grounds on which a marriage is voidable (including, if our foregoing recommendations were accepted, lack of consent) would be abolished as grounds of nullity and be included instead among the factual situations from which irretrievable breakdown of the marriage can be inferred and the marriage be terminated by a divorce.[37] The argument in favour of this is that the two remedies are in substance similar and the difference between them is really only a matter of form;[38] in each case there is a marriage valid until the decree is made and that decree terminates the marriage, but, in the case of nullity, the decree misleadingly declares the marriage to have never existed; that being so, it is more logical to terminate the marriage by a divorce[39] which records the realities of the situation.

24. The arguments in favour of retaining nullity of a voidable marriage are:

(*a*) It is not true to say that the difference between a nullity decree of a voidable marriage and a decree of divorce is a mere matter of form. It may be that the consequences of the two decrees are substantially similar, but the concepts giving rise to the two decrees are quite different: the decree of nullity recognises the existence of an impediment which prevents the marriage from initially becoming effective, while the decree of divorce records that some cause for terminating the marriage has arisen since the marriage. This distinction may be of little weight to the lawyer, but is a matter of essence in the jurisprudence of the Christian Church.

(*b*) The Church attaches considerable importance to consent as a prerequisite to marriage. Consent to marriage includes consent to sexual relations and, hence, impotence can be regarded as having the effect of vitiating consent.[40] Likewise, the grounds under section 9(1)(*b*), (*c*) and (*d*) of the Act of 1965 (mental disorder, epilepsy, pregnancy by another or venereal disease) can be considered to fall under the head of conditional consent[41] and are acceptable to the Church. Except with regard to wilful refusal to consummate, which the Church of England considers should cease to be a ground for nullity and be a ground for divorce, the Church is satisfied with the existing law of nullity.[42] Therefore, so radical a change as is involved in the substitution of a decree of divorce for a decree of nullity in respect of matters which the Church regards as relevant to the formation of marriage and irrelevant to divorce, is likely to be unwelcome to the Church. It is also likely to be resented by people not necessarily belonging to the Church who associate a stigma[43] with divorce and who would therefore prefer to see such matters as impotence and mental disorder,

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[37] See Divorce Reform Act 1969, s.2.

[38] *Turner* v. *Turner* (1888) 13 P.D. 37, 40; *Inverclyde* v. *Inverclyde* [1931] P. 29, 42.

[39] "It may be that it would be more logical to treat impotence as a ground of divorce, as it is in America, where the jurisdiction is not hampered by the rules of the Canon Law": *Re Eaves* [1940] Ch. 109, 122.

[40] Church Report, p. 30.

[41] *Ibid.*, pp. 28, 38–39, 47–48.

[42] *Ibid.*, p. 29.

[43] The stigma attached to divorce is not likely wholly to be removed by the provisions of the Divorce Reform Act 1969 since in many cases there will still be a finding of adultery, desertion or unjustifiable behaviour.

which are illnesses, remain grounds for annulling the marriage rather than causes for dissolving it.

(*c*) It may be that many people do not appreciate the distinction between divorce and nullity. They, presumably, would not oppose turning a nullity of a voidable marriage into a divorce. If, however, such a change is likely to cause offence to a substantial minority, then the proposal cannot be recommended unless some worthwhile advantage is to be gained from the change. The only advantage to be gained would be that one of the present voidable marriages (*i.e.*, one voidable for wilful refusal to consummate), might be thought by some to fit in more "neatly" among divorces than among nullities.[44]

(*d*) The assimilation of voidable marriages and dissolvable marriages could not be complete so long as we retained the bar on divorce within three years of the marriage.[45] Such a bar would be wholly inappropriate to nullity cases.

25. We are, therefore, opposed to the abolition of the class of voidable marriages and think that it should be retained. But the effect of the decrees of nullity of a voidable marriage should be modified so as to make it clear that the marriage is to be treated in every respect as a valid marriage until it is annulled and as a nullity only from the date when it is annulled. This is already the position in a number of other countries[46] and it avoids all the present complications and uncertainties pointed out in paragraph 22 above. As to the form of the decree, it would clearly be desirable if this made it clear whether the marriage had been annulled because it was void or because it was voidable. We think, however, that this is a matter which should be properly left to be settled by practice direction. We accordingly recommend that a voidable marriage, notwithstanding that it is subsequently annulled, should be treated for all purposes as an effective marriage from the date of the marriage ceremony until the decree absolute of nullity, and should continue to be so treated in respect of that period, notwithstanding the subsequent decree of nullity, which should terminate it with the same consequences in law as if it had been ended by a decree absolute of divorce.[47]

26. It remains to be considered, however, whether one of the present grounds, wilful refusal to consummate the marriage, should not be subsumed under divorce rather than nullity. This ground was introduced as a ground for nullity by the Matrimonial Causes Act 1937, and has since been frequently criticised because, as a ground for nullity, it offends against the principle

[44] In New Zealand the decree of nullity of a voidable marriage has been replaced by a decree of "dissolution of a voidable marriage": Matrimonial Proceedings Act 1963 (N.Z.), s.18. We have rejected this solution for the same reasons as we have rejected the substitution of divorce for nullity of a voidable marriage and for the additional reason that we think that a new form of relief which combined in its terminology the concepts of both divorce and nullity may create unnecessary difficulties.

[45] Matrimonial Causes Act 1965, s.2.

[46] *E.g.*, in Australia: see Matrimonial Causes Act 1959, s.51. The same principle has already been adopted here in respect of legitimacy of children: Matrimonial Causes Act 1965, s.11.

[47] The effect of this provision would be to ensure that the remarriage by a party to an annulled voidable marriage before the date of the annulment would always be bigamous; that is to say, *Wiggins* v. *Wiggins* [1958] 1 W.L.R. 1013 would have statutory force: see para. 22.

that the impediment avoiding the marriage must exist at the time of the marriage. The Morton Commission,[48] the Church Report[49] and *Putting Asunder*[50] all advocated that wilful refusal to consummate should, for this reason, cease to be a ground for nullity and be treated as relevant to divorce.[51]

27. Notwithstanding these views, we think that wilful refusal to consummate should remain a ground for nullity. Our reasons are:

(*a*) Wilful refusal to consummate is in most cases the alternative allegation to impotence[52] as it is often uncertain whether the respondent's failure to consummate is due to one cause or the other; the petitioner may not know whether the respondent refuses to consummate the marriage because he is unable to have sexual intercourse or because, though able to have sexual intercourse, he does not want to have it; in such cases the court must draw an inference from the evidence before it and it seems unreal that the relief granted to the petitioner—nullity or divorce—should depend in any given case on the court's view as to which of the two reasons prevented the consummation of the marriage.

(*b*) Failure to consummate, whether it be because the respondent is unable or because he is unwilling to have sexual intercourse, deprives the marriage of what is normally regarded as one of its essential purposes.[53] Parties would think it strange that the nature of the relief should depend on the court's decision whether non-consummation was due to the respondent's inability or whether it was due to his unwillingness. From the parties' point of view the relevant fact would be that the marriage had never become a complete one. To tell them that, in the eyes of the law, failure to complete it due to one cause results in their marriage being annulled, whereas such failure due to another cause results in their marriage being dissolved, would seem to them to be a strange result.

(*c*) The circumstances in which the court can entertain suits for nullity and divorce at present[54] are not the same: for instance, the court has jurisdiction to hear a suit for nullity where, irrespective of domicil, both parties are, or the respondent alone is, resident in England, but there is no jurisdiction (except under the provisions of the Matrimonial Causes Act 1965, section 40) to hear a suit for divorce unless both parties are domiciled in England; therefore, if wilful refusal to consummate were to become a ground for divorce while impotence remained a ground for nullity, a petitioner might find himself unable to allege the two grounds in the alternative, although he himself might not know which of these was the effective cause preventing consummation of his marriage.

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[48] Paras. 88, 89, 283.
[49] Pages 38, 48.
[50] Pages 67, 124–125.
[51] Wilful refusal to consummate is a ground for divorce in Australia and the restriction on presenting a petition within three years of marriage does not apply to this ground: Matrimonial Causes Act (Aust.) 1959, ss.28, 43(2).
[52] See the statistics as to petitions set out in Appendix B.
[53] *Ramsay-Fairfax* v. *Ramsay-Fairfax* [1956] P. 115, 133, C.A.
[54] The question of jurisdiction in divorce and nullity is the subject of an independent study by us but it would be unsafe to assume that the grounds of jurisdiction for both reliefs could be made identical.

(*d*) A petition for divorce may not be presented until three years have elapsed from the date of marriage unless the court gives leave to present an earlier petition on the ground of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent: see Matrimonial Causes Act 1965, section 2. The need to wait three years before being able to start proceedings to terminate the marriage would be a substantial hardship on a man or woman whose partner is unable or unwilling to consummate the marriage, and a special exception would need to be made for this ground of divorce.

28. We, therefore, recommend that:
(*a*) the class of voidable marriages should be retained, and
(*b*) wilful refusal to consummate a marriage should continue to be a ground for nullity.

IV—SHOULD THERE BE ADDITIONAL GROUNDS OF NULLITY?

29. In Working Paper No. 20 we examined seven possible additional grounds of nullity, three already examined and rejected by the Morton Commission and four which we ourselves put forward as worthy of consideration although we did not advocate them. As a result of our consultations we are satisfied that there are only two possible additional grounds which need to be discussed.

Parties of the same sex

30. The first additional ground might be that a marriage could be annulled as a void marriage if the parties are proved to be of the same sex. Two decisions[55] have in fact held that this is already a ground for nullity. In Working Paper No. 20 we did not canvass views on this point, since we had taken the view that such a "marriage" could not be regarded as the "union of one man and one woman" and therefore as a marriage over which the courts have jurisdiction.[56] Notwithstanding the first of the two decisions to which we have referred, it seemed clear to us that the sole remedy of the parties if there was any doubt about the sex of the parties and therefore on whether there was a marriage should be to obtain a declaration as to status under R.S.C. Ord. 15 r. 16. There is, however, now a second decision by the same judge to the effect that the appropriate relief is a decree of nullity and not a declaration under Ord. 15 r. 16.

31. The importance of the distinction between the two forms of relief is simply that the types of financial relief available in cases where a marriage is dissolved or annulled are not available on the grant of a declaration.[57]

[55] *Talbot* v. *Talbot* (1967) 111 Sol. J. 213 (two women); *Corbett* v. *Corbett* [1970] 2 W.L.R. 1306 (two men).

[56] *Hyde* v. *Hyde* (1866) L.R. 1 P. & D. 130.

[57] There was also a difference as regards costs; in the *Corbett* case the "wife" had obtained security for costs, see *Corbett* v. *Corbett* (No. 2) [1970] 3 W.L.R. 195. But in our Report on Financial Provision in Matrimonial Proceedings (Law Com. No. 25) we recommended that the special rule regarding security for costs in matrimonial causes should be abolished (see para. 107 of the Report) and this recommendation has now been implemented by the Matrimonial Causes (Amendment No. 2) Rules 1970.

Under the present law this is of minor importance since most forms of financial relief are available only to a wife against the husband and it is difficult to see how they could be applied to a situation in which, *ex hypothesi*, both are "husbands" or both "wives". It will, however, become of greater importance after 1 January 1971 when the Matrimonial Proceedings and Property Act 1970 comes into operation and wider powers to grant financial provision in favour of either party are introduced.

32. We have not thought it necessary to postpone the submission of this Report until we could undertake a further round of consultation on whether this ground of nullity should be retained. The situation is one which, happily, will arise only very rarely. And the question involved is an issue of social policy on which Parliament will be the judge. In the draft Bill in Appendix A to this Report we have not included it as a ground for nullity since, on the whole, it is our personal view that matrimonial relief, with the possibility of granting financial provision, is not appropriate. In most cases the parties will have entered into the union with full knowledge. If there is a genuine mistake as to sex it is likely to be discovered immediately after the ceremony and the union will then either break up, thus restoring the parties to their former positions with minimal financial hardship to either, or will continue as a homosexual relationship. Unless financial relief is to be extended from marriages to homosexual unions (as indeed one of our correspondents advocated) we can see little reason why it should be available merely because the parties have succeeded in deceiving someone into celebrating the marriage in the belief that they are of opposite sexes. If one of the parties has wilfully deceived the other as to his or her sex and the other has suffered loss in consequence, the other will be able to recover damages in an action for deceit. We appreciate, however, that there may be the rare case in which one party has some of the sexual characteristics of both male and female and in which there may be a genuine doubt which characteristics predominate or, indeed, in which one party believed at the time of the marriage that he or she was of the opposite sex. It may be thought that in these tragic cases the court should be empowered to grant the normal range of financial provision and that the courts can be relied upon to distinguish cases of this sort, where such relief is appropriate, from those in which it is not. If this view is taken by Parliament clause 1 of the draft Bill appended to this Report will require amendment.

Sterility

33. The second possible additional ground, on which a marriage might be made voidable, relates to sterility. Among a number of proposals made to us, was the suggestion that non-disclosure of sterility caused by surgical or other treatment should be such a ground. The main argument in support of it may be summarised as follows:

> Without entering into the merits or demerits of the rule now apparently established in English law[58] that procreation of children is not a principal end of marriage, the factual situation is that to most people that purpose is one of the principal or fundamental ends of marriage; there will be

[58] *Baxter* v. *Baxter* [1948] A.C. 274; see this aspect of this decision criticised in the Church Report, p. 34, where it is pointed out that the court never reviewed a wealth of previous judicial authority to the contrary.

some—in particular women—who would not enter marriage with a particular man or woman if they knew that the prospectvie partner was sterile; some may indeed attach more importance to the ability to have children than to the ability to have sexual intercourse.

34. We appreciate this reasoning and have much sympathy with a spouse in such a situation. Nevertheless, we have come to the conclusion that there are valid reasons against the introduction of non-disclosure of sterility as a ground for nullity and these may be briefly summarised as follows:

(*a*) If concealment of medically induced sterility were a ground of nullity, there would be no justifiable ground for excluding concealment of natural sterility, as it is the fact of sterility, and not its cause, which affects the other spouse.

(*b*) In many cases, whether it be medically induced sterility or natural sterility, the person alleged to be sterile may be uncertain whether he is or is not sterile in fact; even in the case of surgical sterility he may not be aware that he has been made sterile, as when he has had certain types of illness or when he (or more probably she) undergoes a serious internal operation.

(*c*) It seems anomalous that the existence of a ground of nullity should depend on the spouse's knowledge of the existence of the defect and not on the existence of the defect itself. Yet if sterility in itself, as opposed to the wilful concealment of it, were made a ground, every childless marriage would, in effect, be always at risk of being annulled on the allegation of one spouse that he or she is fertile (such allegation being supported by appropriate medical evidence) and that, therefore, the respondent is sterile. So, in the absence of approbation, would every marriage with a woman past the age of child-bearing.

35. Accordingly, we recommend that there should not be any additional grounds of nullity.

V—WHAT SHOULD BE THE GENERAL BARS TO NULLITY?

36. In addition to conditions which have to be fulfilled in the case of particular grounds (which we shall consider later when we review these grounds in detail) there are two general bars: collusion, which applies to all nullity suits; and approbation, which applies to all suits on the grounds which render the marriage voidable.

Collusion

37. In the Ecclesiastical Court[59] collusion was an absolute bar to obtaining a decree of nullity whether of a void or voidable marriage and it continues today to be an absolute bar in nullity suits.[60] Now, however, that the bar of

[59] *Crewe* v. *Crewe* (1800) 3 Hag. Ecc. 123; *Donegal* v. *Donegal* (1821) 3 Phil. R. 597; *Pollard* v. *Wybourn* (1828) 1 Hag. Ecc. 725.

[60] Matrimonial Causes Act 1857, ss. 22, 41; Supreme Court of Judicature (Consolidation) Act 1925, s. 32; *Synge* v. *Synge* [1900] P. 180, 205, 206. See also Matrimonial Causes Rule 9(2), Form 2 (as amended by the Matrimonial Causes (Amendment No. 3) Rules 1970) which requires a petition for nullity to state that there is no collusion.

collusion has been abolished in suits for divorce and judicial separation[61] (after being discretionary in those suits since 1963),[62] the question arises as to what part, if any, collusion should play in suits for nullity. Collusion means an agreement or bargain between the parties whereby the initiation of the suit is procured or its conduct provided for and it ranges from unobjectionable agreements involving maintenance to objectionable arrangements to pervert the course of justice by presenting a false case. There appears to be no good reason why unobjectionable collusion should be a bar to obtaining a decree of nullity of a voidable marriage, and still less so in the case of a void marriage. On the other hand, obtaining a decree by the presentation of a false case is obviously objectionable. This, however, does not necessarily have anything to do with collusion; in an undefended case the petitioner may present a false case without there necessarily being any collusion with the respondent. The reasoning which resulted in the abolition of the bar of collusion in divorce and judicial separation is that it was inappropriate to punish a deceiving litigant by insisting that he remained married, thereby possibly inflicting punishment not only on him but on others as well. To do so is inconsistent with the strictures which have been levelled[63] at the idea that the sanctity of marriage is maintained by insisting that people should remain married as a punishment for their misbehaviour. This reasoning applies with particular strength to a suit for nullity of a void marriage, where the marriage remains void even if a decree of nullity is refused. In Scotland there has never been any bar based on collusion or deceit and apparently the need for such a bar has never been felt: if in truth there were no grounds for the decree, the decree will not be made absolute—not because of deceit, but because of the absence of grounds. If, despite the deceit, there were good grounds for annulment it may be more appropriate to punish the deceiver by some such means as a prosecution for perjury or for perverting the course of justice rather than by refusing a decree.

38. Now that collusion has been abolished as a bar to divorce or judicial separation[64] we can see no reason for maintaining it as a bar to nullity. We recommend its abolition.[65]

Approbation

39. The doctrine of approbation applies to voidable marriages only, *i.e.*, to marriages voidable on the grounds of impotence and wilful refusal to consummate;[66] and, presumably, to the grounds under the Matrimonial Causes Act, section 9(1)(b), (c) and (d),[67] though the requirements that

[61] Divorce Reform Act 1969, s. 9(3).
[62] Matrimonial Causes Act 1965, s. 5, re-enacting the provisions of the Matrimonial Causes Act 1963, s. 4.
[63] See, for instance, our Report on *The Reform of the Grounds of Divorce, the Field of Choice* (Cmnd. 3123), paras. 44, 117.
[64] Divorce Reform Act 1969, s. 9(3).
[65] We also recommend that the opportunity should be taken to abolish collusion as a bar to proceedings for presumption of death and dissolution of marriage under Matrimonial Causes Act 1965, s. 14; it appears, anomalously, to be a bar under existing law: see Divorce Reform Act 1969, Sch. 2 which removed the reference to collusion in sections 6 and 7 of the Matrimonial Causes Act 1965, except in so far as these sections applied to nullity and to presumption of death and dissolution of marriage.
[66] *Scott* v. *Scott* [1959] P. 103.
[67] See paras. 69–75.

proceedings be brought within one year and that no marital intercourse should have taken place after discovery of the defect make the point largely academic. Under our foregoing recommendations, however, one ground on which a marriage is at present void (absence of consent) will become a ground on which it will be voidable. Moreover, we shall later be suggesting a three-year (in place of one year) limitation for bringing proceedings in the case of certain types of voidable marriage. Hence, approbation may be in issue more frequently than now. Approbation means conduct on the part of the petitioner which so plainly implies a recognition of the existence and validity of the marriage as to render it unjust between the parties and contrary to public policy to permit him or her to challenge its validity.[68] But a spouse cannot be said to have recognised the existence and validity of the marriage unless he has knowledge both of the facts and of the law, so that his ignorance that in law he would be entitled on the facts to have the marriage annulled prevents his conduct from amounting to approbation.[69] Thus, there was no approbation where a wife, not realising at the time that the marriage could be annulled, was artificially inseminated by a donor and, when she failed to conceive, the parties adopted a child.[70] And even with knowledge of the law the party who consents to artificial insemination cannot be said to approbate the marriage if he takes this step in the hope of producing normality in sexual relations and not as acquiescence in the abnormal marriage.[71]

40. Both the Morton Commission and the Church Report dealt with the question whether the birth of a child or an attempt to have a child by artificial insemination should be regarded as approbation. They expressed their conclusions somewhat differently. The Morton Commission suggested[72] that artificial insemination of the wife with the husband's consent should be sufficient to prevent annulment of the marriage; the Church Report[73] thought that this consequence should not follow unless "a child has resulted from the joint act, or with the consent of both parties", but that the birth of a child, howsoever conceived, should have that consequence if it resulted from a joint act or consent of both spouses.

41. It seems to us that there are obvious objections to singling out artificial insemination without regard to its consequences as constituting approbation; it would be anomalous if it inevitably operated as a bar whereas the birth of a child conceived by other means did not. On the other hand, logically approbation should depend on the conduct of the parties and not on what may happen as a result of their conduct. If their conduct is such as might have produced a child, then either this is approbation or it is not: what happens subsequently is logically irrelevant. And if what happens subsequently is of any relevance, why should not conception rather than birth be the test? Is nullity to be possible if the decree can be obtained before the birth, or if the wife has a miscarriage or an abortion? Why should it make any difference

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[68] *G.* v. *M.* (1885) 10 App. Cas. 171; *W.* v. *W.* [1952] P. 152.
[69] *Tindall* v. *Tindall* [1953] P. 63; *Slater* v. *Slater* [1953] P. 235.
[70] *Slater* v. *Slater, supra.*
[71] *R.E.L.* v. *E.L.* [1949] P. 211.
[72] Para. 287.
[73] Pages 39, 47.

whether the child dies before birth or an hour afterwards? Is it indeed in the interests of the child that his parents should be denied relief because he has been born?

42. While in our Working Paper No. 20 we did not ourselves recommend any change on this aspect of the law of approbation, in view of the importance of these arguments we invited views as to the points made by the Morton Commission and the Church Report. The replies we received showed that views were divided and that, on the whole, opinion was in favour of leaving the law as it is. We, therefore, do not recommend any change in this respect.

43. There are conflicting authorities on whether approbation is an absolute or discretionary bar.[74] We think that it should be an absolute bar. It is of general advantage to know as soon as possible and with as much certainty as possible whether a marriage is valid or not and undesirable uncertainty may arise if, notwithstanding approbation, the parties are free to challenge the marriage at any time, in the hope that the court will exercise its discretion to declare the marriage invalid. The validity or invalidity of the marriage should not depend on the court's discretion, but should be determined by the relevant facts. We, therefore, recommend that in the case of all voidable marriages approbation should operate as an absolute bar.

44. On the other hand, the desired certainty will not be achieved unless the exact elements of the bar are clearly defined. Hence we recommend that the opportunity should be taken to introduce a definite statutory bar replacing the present common law doctrine and making it clear that there are no separate doctrines of "lack of sincerity",[75] ratification[76] or the like[77] which have been invoked in some of the cases. We also recommend that it should be so defined as to encourage parties to do their best to overcome their difficulties. If the bar can be too readily invoked they may be discouraged (or their lawyers may discourage them) because of the risk that they will thereby lose any chance of having the marriage annulled should their efforts fail. As stated above, the case law suggests that there must be

(*a*) conduct after full knowledge of the right to relief which

(*b*) plainly implies a recognition of the existence and validity of the marriage, so as

(*c*) to make it unjust between the parties and contrary to public policy to challenge its validity.

We are somewhat concerned regarding the inclusion of the reference to public policy. If, as the classical statement[78] implies, there is approbation only if there is both injustice to the parties *and* conflict with public policy the inclusion is innocuous but, as we see it, redundant. If, as may be intended, "and" should be interpreted as "or",[79] so that a court may hold that a marriage has been approbated because it thinks that some concept of public

[74] Discretionary: *Scott* v. *Scott* [1959] P. 103; *Copham* v. *Copham* (1959) Times, Jan. 15; *W.* v. *W.* (1961) 105 Sol. J. 182; absolute: *G.* v. *G.* [1961] P. 87.
[75] See, *e.g.*, *Nash* v. *Nash* [1940] P. 60; *R.E.L.* v. *E.L.* [1949] P. 211.
[76] See paras. 11, 12.
[77] See, *e.g.*, *Tindall* v. *Tindall* [1953] P. 63, 76, C.A.
[78] *G.* v. *M.* (1885) 10 App. Cas. 171, 197–198.
[79] See *Tindall* v. *Tindall* [1953] P. 63, 72 and *Slater* v. *Slater* [1953] P. 235, 244, C.A.

policy so requires despite the absence of injustice to the parties, we regard the requirement as unfortunate. In our view if there is a defect rendering the marriage voidable either party should be entitled (subject, in certain cases, to the three-year time-limit) to have it annulled unless his conduct after he knew his position has been such as to lead the other party reasonably to believe that he would not seek to have the marriage annulled and it would be unjust to the other for him to do so. Lawyers cannot advise their clients with any certainty if there is a risk of individual notions of public policy being invoked.

45. We, therefore, recommend that the new statutory bar described in paragraph 44 above should be the only general bar to petitions for nullity of a voidable marriage and that there should be no bars at all to petitions for nullity of a void marriage.

VI—EXAMINATION OF GROUNDS OF NULLITY

46. As a result of the foregoing recommendations the grounds on which a marriage will be void are:

(*a*) invalid ceremony of marriage;

(*b*) non-age;

(*c*) prohibited degrees (*i.e.*, consanguinity or affinity);

(*d*) prior existing marriage;

and those on which it will be voidable are:

(*e*) incapacity of either party to consummate the marriage;

(*f*) the respondent's wilful refusal to consummate the marriage;

(*g*) lack of consent;

(*h*) mental disorder of either party at the time of the marriage;

(*i*) that the respondent was at the time of the marriage suffering from a venereal disease in a communicable form;

(*j*) that the wife respondent at the time of the marriage was pregnant by a man other than the husband.

There will be no bars to suits to annul void marriages. In the case of voidable marriages there will in all cases be the new statutory bar replacing approbation. At present certain additional conditions have to be fulfilled in the case of suits on grounds (*h*), (*i*) or (*j*). We proceed to consider all the grounds (*a*) to (*j*) in turn and to discuss amendments to the additional conditions applicable to grounds (*h*), (*i*) and (*j*) and their possible extension to other grounds of voidability.

Void Marriages

(a) Invalid ceremony of marriage

47. In December 1969 the Law Commission and the Registrar-General set up a Working Party to inquire into the formal requirements for the solemnisation and registration of marriage and to propose what changes are desirable. The Working Party intends to formulate proposals which will

form the basis of a consultative document to be circulated generally for comment and, consequently, we do not propose to comment in this Report on the formalities of marriage or on the circumstances in which failure to comply with such formalities makes the ceremony void.

(b) Non-age

48. A marriage between two persons either of whom is under the age of sixteen is void.[80] The Latey Committee[81] was unanimous that sixteen should remain the minimum age of marriage and this is also our view. We have already rejected the suggestion that the law should be altered so as to make under-age marriages valid in certain circumstances.

(c) Prohibited degrees

49. The persons whom one may not marry by reason of consanguinity or affinity are set out in the First Schedule to the Marriage Act 1949. They are:

For a man	*For a woman*
1 Mother	1 Father
2 Daughter	2 Son
3 Grandmother	3 Grandfather
4 Granddaughter	4 Grandson
5 Sister	5 Brother
6 Aunt	6 Uncle
7 Niece	7 Nephew
8 Father's, son's grandfather's or grandson's wife	8 Mother's, daughter's grandmother's or granddaughter's husband
9 Wife's mother, daughter, grandmother or granddaughter.	9 Husband's father, son, grandfather or grandson.

These prohibited degrees of relationship include half-blood[82] and illegitimate[83] relationships. These prohibitions apply to all marriages in England and to the marriage abroad of a person domiciled in England.[84]

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[80] Marriage Act 1949, s. 2; this section applies to a marriage wherever celebrated if one of the parties is domiciled in England: *Pugh* v. *Pugh* [1951] P. 482. A marriage between parties where one is or both are under the age of sixteen is regarded as valid by English law if it is valid by the law of the domicil of both parties and if the marriage is celebrated in a country where such a marriage is valid: *Alhaji Mohamed* v. *Knott* [1969] 1 Q.B.1. It may be of interest to compare the marriage age in other countries (the lower figures in brackets show the minimum age at which permission to marry may be granted by a court or other public authority with or without parental consent). Australia: 18 for males and 16 for females (16 and 14); New Zealand: 16 for both sexes; Canada: 16 to 14 according to Province; France: 18 for males and 15 for females with permission to marry earlier possible; Republic of Ireland: 14 for males and 12 for females; Italy: 16 for males and 14 for females (14 and 12 possible); Japan: 18 for males and 16 for females; Sweden: 21 for males and 18 for females with permission to marry earlier possible; Switzerland: 20 for males and 18 for females (18 and 17); U.S.A.: 20 to 14 for males and 18 to 12 for females according to State with permission to marry under the prescribed age in some States; West Germany: 18 for males and 16 for females, with permission to marry earlier possible. The Latey Committee examined the age limits in foreign countries and concluded that "before one could apply, as appropriate to England, the age limits in another country one would have to ascertain that the social conditions were broadly comparable": *Report of the Committee on the Age of Majority* (1967); Cmnd. 3342, para. 52.

[81] *Report of Committee on Age of Majority* (1967); Cmnd. 3342, paras. 166–177.

[82] *R.* v. *Brighton Inhabitants* (1861) 1 B. & S. 447; Marriage Act 1949, s. 78(1); Marriage (Enabling) Act 1960, s. 1(2).

[83] *Restall* v. *Restall* (1929) 45 T.L.R. 518.

[84] *Re De Wilton* [1900] 2 Ch. 481.

50. An adopter and the person whom he adopts under an adoption order are deemed to be within the prohibited degrees and they continue to be so notwithstanding that someone else adopts that person by a subsequent adoption order.[85] This is the only prohibition against marriage arising out of adoption, so that, for instance, if a couple who have a natural son, S, adopt as their daughter a girl, D, S and D may marry each other. In Working Paper No. 20 we invited views on whether this was satisfactory or whether existing prohibited degrees should apply in the case of adoptive relationship, treating the adopted child as if he were, for this purpose, the natural child of his adoptive parents. The overwhelming view of legal, medical and lay commentators was that the adoptee should be, in this respect, wholly integrated into the adopting family. But the Standing Conference of Societies Registered for Adoption and the majority of children's officers and departments consulted through the Home Office were more cautious and did not want any change in the present law. We came to the same conclusion. Since then the Home Secretary and the Secretary of State for Scotland have appointed a Departmental Committee on Adoption of Children which will consider the question of the adopted child's position in relation to marriage within his adoptive family[85a] and, in these circumstances, we think that we ought not to make any recommendations on this point.

51. The prohibited degrees of relationship fall into two categories: consanguinity, *i.e.*, relationship by blood, and affinity, *i.e.*, relationship by marriage. The two categories must be examined separately when discussing whether the existing prohibitions should be modified.

52. It seems safe to assume general acceptance of the view that a man should not marry his daughter, granddaughter, mother, grandmother or sister. It is in fact a criminal offence for a man knowingly to have sexual intercourse with such female relations (including those of the half-blood, or illegitimate), with the exception of his grandmother.[86] The remaining prohibited degrees of consanguinity are, in the case of a man, his aunt and niece and in the case of a woman, her uncle and nephew. A man and his great-aunt and his great-niece, or a woman and her great-uncle and great-nephew, are not within the prohibited degrees. The question whether there should be any alteration in these existing prohibited degrees of consanguinity is partly biological and partly social and moral.

(*a*) In so far as the question is biological, the answer depends on an evaluation of scientific evidence. The marriage of uncle and niece, or nephew and aunt is permitted in some countries and by some religions[87] and it may well be that there is no such bioligical objection

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[85] Adoption Act 1958, s. 13(3).

[85a] The Committee has just published a Working Paper containing provisional conclusions for consideration: *Adoption of Children* (H.M.S.O. 1970). This recommends that such marriages should be prohibited unless leave of the court is obtained: paras. 251, 252 and Proposition 72. It is not clear whether the Committee envisages that a marriage without leave would be void, or would be valid notwithstanding the absence of leave as is a marriage of a minor of 16 or 17 without the requisite parental or other consent.

[86] Sexual Offences Act 1956, ss. 10, 11.

[87] See, for instance, *Cheni* v. *Cheni* [1965] P. 85 (marriage of uncle and niece valid by Egyptian and Jewish law); *Re De Wilton* [1900] 2 Ch. 481 (marriage of uncle and niece in Germany); *Peal* v. *Peal* [1931] P. 97 (marriage in India of nephew and aunt by half-blood with dispensation of Roman Catholic Church).

to these marriages as to justify legal prohibition. They may well be no more objectionable biologically than the marriage of a man with his grandparent's sister[88] or of a woman with her grandparent's brother, which is not within the prohibited degrees.

(*b*) Nevertheless, the question raises social and moral problems, the answer to which must depend on public opinion. Would public opinion tolerate or object to marriages between uncle and niece or nephew and aunt and, if it objects to such unions, does it wish to extend the prohibition to great-uncle and great-niece and great-nephew and great-aunt? Many people would no doubt instinctively hold the view that such marriages are unnatural and wrong, just as they would view with revulsion a marriage between brother and sister, even if there were no biological reasons against such a union. There are some matters of conviction on which men hold strong feelings of right and wrong though they cannot place their fingers on any particular reason for this conviction. It may be that such unions would be generally regarded as just as wrong as a marriage between adopter and adopted child—a union which is clearly considered objectionable although there cannot be any biological ground for this.

53. The prohibited degrees of affinity fall into two categories: those which prohibit a man from marrying his father's or grandfather's wife and his son's or grandson's wife and those which prohibit him from marrying his wife's mother, grandmother, daughter or granddaughter (and the equivalent male relations in the case of a woman). The historical objection to such unions was based on the ground that husband and wife were one, so that relationship by marriage was equivalent to relationship by blood. This reasoning is unlikely to appeal today and one must ask whether there exist social or moral reasons against such unions. As in the case of consanguinity, there are undoubtedly people who feel that such unions are morally wrong and should not be permitted. On the other hand, there are others who feel that such unions are no more objectionable than those permitted by the Marriage (Prohibited Degrees of Relationship) Acts 1907 to 1931 and the Marriage (Enabling) Act 1960.[89]

54. The Morton Commission had as part of their terms of reference "to consider whether any alteration should be made in the law prohibiting marriage with certain relations by kindred or affinity".[90] The Commission recommended that the then existing prohibition against a man marrying his divorced wife's sister, niece or aunt (or a woman marrying her divorced

[88] This is a less fantastic possibility than the marriage of a man to his grandmother which is expressly forbidden; moreover, the great-aunt may be considerably younger than the grandparent, particularly if the relationship is half-blood or illegitimate.

[89] The Deceased Wife's Sister's Marriage Act 1907 allowed marriage between a man and his deceased wife's sister; the Deceased Brother's Widow's Marriage Act 1921 allowed marriage between a man and his deceased brother's widow; the Marriage (Prohibited Degrees of Relationship) Act 1931 allowed marriage between persons and their deceased spouse's nephew, niece, uncle or aunt and between persons and their deceased nephew's, niece's, uncle's or aunt's widow or widower. These Acts have been repealed and re-enacted by the Marriage Act 1949 s. 1(2) and First Schedule, Part II.

[90] Morton Commission, p. iv.

husband's brother, nephew or uncle) should be removed[91] and this recommendation resulted in the passing of the Marriage (Enabling) Act 1960. In addition to this proposal there were "a few witnesses" who proposed that all prohibitions on marriage with relations by affinity should be abolished.[92] The Commission recommended that there should be no change in the law relating to the marriage of persons within the prohibited degrees of relationship other than that mentioned;[93] this change was made by the 1960 Act. We know of no evidence that public opinion has changed since 1955 and now desires a revision of the existing prohibited degrees. The almost unanimous view of those who commented on our Working Paper No. 20 was that the law should remain as it is. We so recommend.

(d) Prior existing marriage

55. It is thought that no comment on this ground is needed.

Voidable Marriages

(e) Impotence

56. Impotence (or incapacity) is inability to consummate the marriage. Such inability can arise from a physical defect or from a mental condition such as invincible repugnance to the sexual act; it also happens that a person may be generally capable of having sexual intercourse, but, owing to some cause such as hysteria, be incapable with the other spouse.[94] In all such cases the marriage can be annulled on the petition of either party provided the impotence existed at the time of marriage[95] and is incurable or curable only by an operation attended with danger;[96] in the case of a respondent, a defect which is curable but which the respondent refuses to have cured is treated as if it were incurable.[96] Sterility as such is not impotence,[97] so that voluntary sterilisation before marriage is no ground for relief.[98] We have already rejected the proposal that it should be.[99]

(f) Respondent's wilful refusal to consummate the marriage

57. This ground was introduced as a ground for nullity by the Matrimonial Causes Act 1937. We have already rejected the proposal that it should instead be made a ground for divorce.[1]

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[91] *Ibid.*, para. 1167.
[92] *Ibid.*, para. 1159. For a recent example where a man purported to marry his son's divorced wife, see *The Times* 21 August 1970, p. 2.
[93] *Ibid.*, para. 1170.
[94] This is known as impotence *quoad hunc* or *quoad hanc*.
[95] Impotence arising after marriage is no ground of complaint either in nullity (*Brown* v. *Brown* (1828) 1 Hag. Ecc. 523) or divorce: *P.* v. *P.* [1965] 1 W.L.R. 963, 968; *Sheldon* v. *Sheldon* [1966] P. 62, 78.
[96] *S.* v. *S.* [1956] P. 1. In the case of elderly people where a party is impotent because of advanced age, the right to have the marriage annulled may be barred by approbation: *Morgan* v. *Morgan* [1959] P. 92 and will continue to be liable to be barred by the new statutory bar which we have suggested should replace it.
[97] *L.* v. *L.* (1922) 38 T.L.R. 697.
[98] *Baxter* v. *Baxter* [1948] A.C. 274 at 289, overruling *J.* v. *J.* [1947] P. 158.
[99] Paras. 33–35.
[1] Paras. 23–25.

(g) Lack of consent

58. Under our foregoing recommendations this will become a ground on which a marriage is voidable instead of void as it probably is under the present law. Consent may be deemed to be lacking either because of unsoundness of mind or because of mistake or duress. We proceed to consider each of these in turn.

Unsoundness of mind

59. Consent will be lacking if a party is incapable of giving his consent because of his unsoundness of mind. A person is regarded as being incapable of giving consent if he is incapable of understanding the nature of the marriage, which involves a mental capacity to appreciate the responsibilities normally attaching to marriage.[2]

60. We think that this test of what constitutes unsoundness of mind is satisfactory and should not be modified; any higher test might result in elderly or mentally retarded persons being incapable of contracting a valid marriage, while any lesser test might result in persons of seriously unsound mind being capable of contracting a valid marriage. In Working Paper No. 20 we raised the question whether persons with serious inheritable mental defects should be altogether prohibited from marrying.[3] We pointed out that, if such a prohibition were thought to be desirable, one would have to consider how the class of persons to whom it should apply should be defined. As we have not received any evidence in support of such a prohibition and as the overwhelming view of commentators was against the introduction of such a prohibition, we recommend that there should be no change in the law in this respect.[4]

Mistake or Duress

61. A valid marriage requires free consent (a) to marry and (b) to marry a particular person. If a person goes through a ceremony of marriage not realising that it is such a ceremony,[5] or if he goes through a marriage ceremony with A believing her to be B,[6] there is no consent. Similarly, duress can engender such fear as to vitiate consent.

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[2] *Re Park* [1954] P. 112, C.A.; *Hill* v. *Hill* [1959] 1 W.L.R. 127, P.C. A person of unsound mind may contract a valid marriage during a lucid interval when he understands the nature of the marriage (*Turner* v. *Myers* (1808) 1 Hag. Con. 414), but that marriage may be voidable in certain circumstances under s. 9 of the Matrimonial Causes Act 1965: see para. 69 below.

[3] There was a precedent for a total prohibition in the Marriage of Lunatics Act 1811, which provided that the marriage of a lunatic so found by inquisition or of a person who or whose estate had been committed to the care and custody of trustees under any statute was void, but this Act was repealed by the Mental Health Act 1959.

[4] We have recommended that lack of consent due to unsoundness of mind at the time of marriage should make the marriage voidable, instead of void: paras. 14, 15.

[5] *Mehta* v. *Mehta* [1945] 2 All E.R. 690 (wife thought marriage ceremony was ceremony of conversion to Hindu religion).

[6] *R.* v. *Millis* (1844) 10 Cl. & Fin. 534, 785–6.

62. The various factors which do or do not vitiate consent must be examined separately.

(*a*) Fear vitiates consent if sufficiently grave and if it arises from external circumstances for which the petitioner is not himself responsible.[7] Thus, where a woman was forced by her father's threats to marry[8] or where a man married through fear of false criminal charges being preferred against him,[9] the marriage was in each case invalid, but it seems that in the latter case the marriage might have been valid if the threats had been to prefer against the man charges in respect of crimes which he had in fact committed.

(*b*) It seems clear, notwithstanding dicta that may suggest the contrary,[9] that the test of whether the will was overborne is a subjective one and does not depend on whether the fear was reasonably entertained.[10] If the boy or girl in question has been forced into marriage by threats, it must be irrelevant that a person of greater experience or fortitude would have resisted. Similarly if the person in question entered into the marriage under a mistake sufficiently fundamental to vitiate consent it is clearly irrelevant that a person of greater knowledge or education would not have laboured under that mistake (but the fact that the mistake was unreasonable may be cogent evidence that he did not in fact labour under it).

(*c*) Fraud does not vitiate consent unless it brings about a mistake as to the ceremony or the persons. Other fraudulent misrepresentations or concealments which induce consent do not vitiate the consent if it was given freely and not under duress, even though it would never have been given but for the misrepresentation or concealment;[11] thus, where the wife concealed from her husband that at the time of the marriage she was pregnant by another man, the marriage was valid[12] (though it might now be voidable under section 9 of the Matrimonial Causes Act 1965).

(*d*) As regards a mistake as to the other party to the marriage, only a mistake as to the identity of that party vitiates consent. A mistake as to fortune, health, status, moral character or other quality does not

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[7] *Buckland* v. *Buckland* [1968] P. 296; *McLarnon* v. *McLarnon* (1968) 112 Sol. J. 419.
[8] *Parojcic* v. *Parojcic* [1958] 1 W.L.R. 1280.
[9] *Buckland* v. *Buckland, supra.*
[10] *Scott* v. *Sebright* (1866) 12 P.D. 21, 24 ("Whenever from natural weakness of intellect or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger"); *Hussein* v. *Hussien* [1938] P. 159, 160; *H.* v. *H.* [1954] P. 256, 266.
[11] *Swift* v. *Kelly* (1835) 3 Knapp 257 at 293: "No marriage shall be void merely upon proof that it had been contracted upon false representation and that but for such contrivances, consent would never have been obtained. Unless the party imposed upon has been deceived as to the person, and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made"; *Moss* v. *Moss* [1897] P. 263 at 267–269: "No fraudulent concealment or mis-representation enables the defrauded party who has consented to the marriage to rescind it . . . [W]hen in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation".
[12] *Moss* v. *Moss* [1897] P. 263.

affect the validity of the marriage, except that mental disorders, pregnancy by another, venereal disease and epilepsy are grounds on which a marriage is voidable under section 9 of the Matrimonial Causes Act 1965 (see paragraphs 69–75).

(*e*) A mistake as to the nature of the ceremony vitiates consent, but a mistake as to the effect of the marriage does not: thus, a husband's mistaken belief that a foreign marriage imposed a duty on the spouses to live together and that his wife would be allowed to accompany him to England,[13] or the husband's belief that he was entering into a polygamous marriage whereas in fact it was monogamous[14] (or, presumably, vice versa), does not invalidate a marriage.

(*f*) Intoxication to the extent of inducing in a person a "want of reason or volition amounting to an incapacity to consent" will vitiate consent.[15]

63. There are two aspects of the law on lack of consent arising from duress or mistake to which we have given particular attention. The first relates to duress. As stated in paragraph 62(*a*), it has been suggested that fear does not vitiate consent unless it arises from external circumstances for which the petitioner is not himself responsible. Thus, if the petitioner has in fact committed a crime and is threatened with exposure unless he marries and if he, through fear of exposure, does marry, the marriage may be valid notwithstanding the threat, because, in such event the petitioner's fear arises from circumstances for which he is himself responsible. We have considered whether the existing law on this point can be regarded as being satisfactory, or whether the legal consequences of duress should be made to depend solely upon its effect on the petitioner's mind; for instance, if the petitioner has committed some misdeed and is threatened with exposure unless he marries, should the threat be capable of rendering the marriage voidable? If the threat of exposing the petitioner's conduct were made capable of amounting to duress, one must go on to consider whether the nature of the conduct in respect of which exposure is threatened should be relevant; for instance, should the consequence of the threat be different according to whether—

(i) the petitioner is threatened with exposure of a crime which he has in fact committed unless he marries the woman in question, or

(ii) the petitioner is threatened with affiliation proceedings unless he marries the woman by whom he has had a child?

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[13] *Way* v. *Way* [1950] P. 71, 79–80; overruled on other points *sub. nom. Kenward* v *Kenward* [1951] P. 124, 135, 136, C.A.

[14] *Kassim* v. *Kassim* [1962] P. 224. The question whether consent is vitiated by a mistaken belief that the effect of the ceremony will be to create a monogamous marriage, whereas in reality it creates a polygamous one, is not one that can come before the English courts as they have no matrimonial jurisdiction over polygamous marriages. Even if they were afforded such jurisdiction (which will be one of the subjects covered in a forthcoming Report), the question would not fall to be determined by English internal law since a polygamous marriage can only be celebrated abroad and between parties domiciled abroad Hence, the issue would primarily be determined by the foreign law governing the validity of the marriage although English public policy might also be relevant.

[15] *Sullivan* v. *Sullivan* (1818) 2 Hag. Con. 238, 246.

64. It is clearly desirable that marriage should be absolutely voluntary, because entry into marriage reluctantly or under a sense of compulsion is likely to militate against the success of that marriage. This suggests that fear should vitiate consent if it is of sufficient degree to do so and irrespective of whether the petitioner is or is not responsible for the circumstances from which such fear arises. Similarly, it can be contended that the nature of the circumstances for which the petitioner is himself responsible should be immaterial; that is to say, it should make no difference to the issue of consent whether the petitioner's fear results from, for instance, a threat to expose a crime which he has committed or to take affiliation proceedings in respect of a child of whom he is the father. On this basis the issue should depend solely on whether consent was free in the sense of the will not being overborne by threats.

65. On the other hand, we do not think that public opinion would regard it as right that a marriage should be voidable merely because the man has been threatened with exposure or legal proceedings if he does not marry the girl that he has made pregnant. Indeed, it would often be difficult in such a context to distinguish threats from mere statements of alternatives and, insofar as a distinction could be drawn, it might lead to unrealistic differences according to the social background of those involved. While Alfred Doolittle would say to the young man who had wronged his daughter: "you marry my girl or else", Soames Forsythe would merely point out the various alternative courses of action and the consequences of each. But the effect on the young man's freedom of will would be much the same in both cases.

66. If one reviews the actual decisions reached by the courts rather than some of the reasons which have been advanced in reaching those decisions, the results seem to be about right. What in effect they have done is to distinguish legitimate threats from illegitimate ones. They have rightly held that the threat is illegitimate if it is to make a false charge against the person threatened. They have implied that it may be legitimate if the charge is just. But no court has gone so far as to hold that a threat is necessarily legitimate on that ground. We doubt, for example, whether any court would hold that it is a legitimate threat not capable of vitiating consent for an employer to tell the office-boy who has robbed the till that unless he marries the employer's ex-mistress he will be prosecuted. In our view, this is not a matter in which legislative action is required. Any attempt to define duress with the precision appropriate to a statute would, in our view, be likely to do more harm than good. We think that the courts can safely be left to deal with each case on its merits.

67. As stated in paragraph 62(*e*), a mistake as to the effect of the marriage (as opposed to a mistake as to the nature of the ceremony) does not vitiate consent. The question arises whether the rule should remain as it is or whether a mistake as to the effect of the marriage should make it voidable for lack of consent. Should a mistaken belief that a marriage imposes a duty to cohabit entitle a party to have a marriage annulled? If mistake as to the effect of the marriage were a ground for avoiding it, it would be necessary to determine what mistakes are sufficiently fundamental to entitle a party to relief, for it would be going too far to suggest that any mistake, however insignificant,

as to the mutual obligations of the spouses would suffice for this purpose. As stated in Working Paper No. 20, one solution might be to enact that a fundamental mistake as to the obligations of the marriage would suffice, leaving the court to decide each case on its merits and, in due course, to formulate a principle; another solution might be to confine relief to cases where the mistake as to the effect of the ceremony was induced by fraud.

68. Though we have found the questions raised in paragraph 67 not easy to answer, we have, after consideration of the replies we received, come to the conclusion that the suggested solutions are not feasible. The first would formulate a test which is too vague to be practical. Moreover, rights and obligations of a monogamous marriage are substantially the same everywhere and such variations as there may be from country to country are unlikely to result in fundamental mistakes except in very rare cases.[16] The second suggested solution would clearly go too far. If the mere fact that the respondent has made a fraudulent misrepresentation as to the effect of the marriage which the petitioner has believed were sufficient to avoid the marriage, then a marriage could be avoided on the basis that the man had falsely told the lady that the effect of the marriage would be to entitle her to wear the pearls which are family heirlooms or to use the courtesy title of Lady X. Accordingly we do not recommend any change in the law relating to mistake otherwise than that mistake should make a marriage voidable, not void.

(h) Mental disorder or epilepsy

69. Under section 9(1)(*b*) of the Matrimonial Causes Act 1965 a marriage is voidable if at the time of the marriage either party to the marriage—

(i) was of unsound mind, or

(ii) was suffering from mental disorder within the meaning of the Mental Health Act 1959[17] of such a kind or to such an extent as to be unfitted for marriage and the procreation of children, or

(iii) was subject to recurrent attacks of insanity or epilepsy.

70. Ground (i) appears at first sight to cover the same situation as does insanity vitiating consent and this was stated to be so in the recent case of *Bennett* v. *Bennett*.[18] However, apart from the decision in this case, we would have approached the question of construction of section 9(1)(*b*) in the following way. For unsoundness of mind to vitiate consent the spouse must be incapable of understanding the nature of marriage. The expression "of unsound mind" in section 9(1)(*b*) is not limited to this type of unsoundness of mind. It presumably has the same meaning as "of unsound mind" in section 1(1) as a ground for divorce[19] and this has been construed to designate a person who, judged by the ability of the reasonable person to manage his affairs, is incapable of managing himself and his affairs, including the problems of work, society

[16] See para. 62 (*e*), fn. 13.

[17] Mental Health Act 1959, s. 4(1): "In this Act 'mental disorder' means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind."

[18] [1969] 1 W.L.R. 430; the statement was *obiter* as the issue of unsoundness of mind had been abandoned (at 432) and did not call for decision.

[19] See *Whysall* v. *Whysall* [1960] P. 52 at 64, 65. It will cease to be a ground for divorce as a result of the Divorce Reform Act 1969.

and marriage.[20] A spouse may well understand the nature of marriage at the time of its celebration, but be incapable generally of managing himself and his affairs.[21] This was the view adopted by the Morton Commission[22] which recommended that this part of section 9(1)(*b*) should be redrafted "so as to make it clear that it refers only to a person who has gone through a ceremony of marriage with a full understanding of the nature of that ceremony and what it imports but who nevertheless was of unsound mind at the time". It was also in accordance with the view of the Gorell Commission[23] which first recommended the addition of this ground of nullity to cover the case "where the other party, though of sufficient understanding to consent to a marriage, is, at the time of the marriage . . . of unsound mind in other respects". Whatever be the correct interpretation of the present statutory provision, we think that if ground (i) is retained it should be re-drafted so as to ensure that these recommendations of the Gorell and Morton Commissions are implemented.

71. In fact, however, we think that ground (i) should be omitted since this state of mind is fully covered in ground (ii) by the expression "mental disorder within the meaning of the Mental Health Act 1959 of such a kind or to such an extent as to be unfitted for marriage". It has been held[24] that the test of "unfitted for marriage" is "something in the nature of"—

> "Is this person capable of living in a married state and of carrying on the ordinary duties and obligations of marriage? . . . In order to succeed the petitioner must establish 'mental disorder' within the meaning of section 4 of the Act of 1959 and go on to show that as a result of such mental disorder the respondent is incapable of carrying on a normal married life."

We are unable to distinguish this from the test suggested above of whether a person is of unsound mind.

72. As regards ground (ii), we think that the words "and the procreation of children" should be omitted. The meaning and scope of these words are not clear[25] and it seems to us that if the purpose of nullity is to give relief to the spouses from a marriage containing a defect going to the root of the marriage relationship, unfitness for marriage should be sufficient in itself to invalidate it without any additional requirement in relation to children.

73. Concerning ground (iii), we think that epilepsy should be omitted. Whatever the medical position in 1937,[26] to-day epilepsy responds to treatment and can be kept under control. There are valid reasons why unsoundness of

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[20] *Whysall* v. *Whysall* [1960] P. 52; *Robinson* v. *Robinson* [1965] P. 192; *Woolley* v. *Woolley* [1968] P. 29.

[21] We think there is a meaningful difference between these two tests, contrary to the view expressed in *Bennett* v. *Bennett* [1969] 1 W.L.R. 430 at 433 that there was no "appreciable distinction or difference" between them.

[22] Para. 275.

[23] Para. 353.

[24] *Bennett* v. *Bennett*, *supra*, at 434.

[25] *Bennett* v. *Bennett*, *supra*, at 434: "I am quite unable to suggest any meaning to the phrase 'unfitted for the procreation of children' unless what is meant is unfitted to bring up children, which is not what is said."

[26] The Matrimonial Causes Act 1937, s. 7 first made a marriage voidable on the ground that either party "was at the time of the marriage . . . subject to recurrent fits of epilepsy".

mind and mental disorder should be grounds for nullity, but epilepsy is not a mental illness and we think it is wrong that this one particular affliction should be singled out as a ground for nullity. This was the view taken by a number of commentators (medical as well as lay) on our Working Paper.[27]

74. Finally, we think that the section should be re-drafted so as to make it clear that, whatever the type of mental disorder, it makes no difference whether its manifestations are continuous or intermittent. At present it is only in relation to "insanity" (or epilepsy) that "recurrent attacks" are mentioned. We recommend that the section should be re-drafted so as to cover a spouse suffering from mental disorder of a kind unfitting for marriage, whether continuous or recurrent.

(i) The respondent was at the time of the marriage suffering from a venereal disease in a communicable form

(j) The respondent was at the time of the marriage pregnant by a man other than the husband

75. These two grounds were added by the Matrimonial Causes Act 1937 and are now stated in section 9(1)(*c*) and (*d*) of the Act of 1965. We do not recommend any change. Nor do we recommend an addition on the lines of the provision of New Zealand law[28] that the wife should be able to have the marriage annulled if at the time of the marriage some woman other than the wife was pregnant by the husband.

Additional conditions on annulment of certain voidable marriages

76. Approbation is at present a bar to proceedings to annul a voidable marriage on any ground. The statutory bar which we have recommended should replace approbation will similarly apply to all such grounds. In addition, further conditions have to be fulfilled in the case of a petition on grounds (*h*), (*i*) or (*j*). We proceed to consider these conditions and to discuss whether they should be extended to other grounds.

77. By virtue of subsection (2) of section 9 of the Matrimonial Causes Act 1965 grounds (*h*), (*i*) and (*j*) are subject to three limitations:

(*a*) the petitioner must at the time of the marriage be ignorant of the facts alleged;

(*b*) proceedings must be instituted within a year from the date of the marriage;

(*c*) marital intercourse with the consent of the petitioner must not have taken place since the petitioner discovered the existence of the grounds for a decree.

78. Limitation (*a*) is normally reasonable since a petitioner who enters the marriage with knowledge that there exists a particular defect in one or other of the spouses should not be able to claim that the marriage is invalid on

[27] The hope that epilepsy would cease to be a ground of nullity is expressed in the Report on "People with Epilepsy" (para. 46) issued by a sub-committee of the Department of Health and Social Security: H.M. Stationery Office, 1969.

[28] Matrimonial Proceedings Act (N.Z.) 1963, s. 18(2)(*d*). This provision has been widely criticised: see, for example, Inglis: *Family Law* (2nd Ed.) p. 85.

account of that very defect. Accordingly, we have no doubt that limitation (*a*) should remain in the case of grounds (*i*) and (*j*) (that the respondent at the time of the marriage was suffering from venereal disease in a communicable form or was pregnant by another). We think, however, that in the case of mental disorder (ground (*h*)) knowledge of the disorder at the time of marriage should not in itself bar relief. There are two principal reasons for distinguishing this ground from the others. First, it is not just mental disorder which is a ground for relief, but mental disorder "of such a kind or to such an extent" as to cause the respondent to be "unfitted for marriage", so that even if the disorder is known to the petitioner at the time of marriage, its gravity or its future development or its impact on the marriage may not be then apparent to him. Secondly, the petitioner may know that the respondent had previously suffered from mental disorder to a more or less severe degree, but such disorder may be quiescent at the time of marriage and medical prognosis as to its future course may be inconclusive. It would be hard on the petitioner if, contrary to his hopes and expectations, there were a recurrence of the disorder, so that it became clear that the respondent had all along been "unfitted for marriage" and the petitioner then found himself barred from relief, although his only fault may have been an over-optimistic evaluation of the medical advice he had been given. This does not mean that the petitioner's knowledge at the time of marriage is irrelevant, but we think that the proper role for such knowledge is within the framework of the statutory bar replacing approbation.[29] Thus, knowledge of the defect at the time of the marriage should not in itself be a bar to relief, but should be a matter to be considered with other factors.[30]

79. Limitation (*b*) lays down a fixed time-limit for bringing proceedings. The court has no discretion to enlarge the time-limit, even in the case of fraud on the respondent's part.[31] The Morton Commission[32] heard evidence that this restriction results in hardship in that a would-be petitioner may not become aware of the facts in time to enable him to take proceedings; for instance, when he goes abroad immediately after the marriage. Two main proposals were suggested for modifying the present time-limit: first, that the court should have a discretion to enlarge the time-limit and, secondly, that the time-limit should run from the date of discovery of the matter of complaint and not from the date of marriage. The Morton Commission "on balance" preferred the first proposal on the ground that it would produce greater certainty. But it seems to us that uncertainty is inherent in both proposals. The existence of a discretionary power to enlarge the time for instituting proceedings of necessity means that the status of the marriage remains uncertain so long as it is open to a party to apply for leave to present a petition nonwithstanding the expiry of the time-limit.

80. We agree with the Morton Commission that it is preferable to have a time-limit from the date of marriage, but we think that the existing time-limit of one year from marriage is too short. In addition to the example given by the

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[29] See para. 44.
[30] This is the position under the existing law of approbation: *J.* v. *J.* [1947] P. 158.
[31] *Chaplin* v. *Chaplin* [1949] P. 72.
[32] Paras. 284, 285.

Morton Commission (where a petitioner goes abroad), there may be circumstances where one year does not give sufficient time for discovery of the defect and the institution of proceedings, always allowing for the human element of hesitation whether, having discovered the defect, to bring proceedings or not. We think that it would be more satisfactory to substitute three years for the existing time-limit of one year. As we have said, this should run from the date of marriage; it would be undesirable to introduce the possibility of the marriage being annulled because of the discovery at a late stage of facts rendering the marriage voidable, *e.g.*, the husband discovering after thirty years that the first child was not his.

81. Limitation (*c*) has been construed to mean that a petitioner who has before him facts from which he, as a reasonable man, knows or ought to know of the existence of the grounds for a decree, has "discovered" their existence, so that marital intercourse thereafter will debar him from a decree.[33] The question whether knowledge of the law, as well as of the facts, is necessary before a petitioner can be said to know of the existence of grounds for a decree has been left open.[34] This limitation works harshly for it imposes an objective test in what is essentially a personal and subjective relationship. The knowledge should not be that of the hypothetical reasonable man on the Clapham omnibus, but real knowledge on the petitioner's part and a full appreciation by him that the defect is a ground for terminating the marriage. It is unjust to deprive him of relief merely because, not realising that he has grounds for terminating the marriage, he tries to make the best of it and does not immediately break off marital relations. Moreover, the law should encourage reconciliation, a factor strongly stressed in recent legislation providing for matrimonial relief,[35] and if a petitioner discovers the existence of a defect, for example, mental disorder or pregnancy by another, he should not be placed in the position that if he attempts a reconciliation and it fails he thereby loses all right to relief. We think, therefore, that the statutory bar replacing approbation adequately takes care of this and that the additional limitation is unnecessary and undesirable.

82. We, therefore, recommend that the provisions of the present section 9(2) should be amended so that a decree of nullity on the grounds therein specified would not be granted unless—

(*a*) proceedings were instituted within three years of the date of marriage; and

(*b*) in the case of the ground that the respondent at the time of marriage was suffering from venereal disease in a communicable form or was pregnant by another, the petitioner was at the time of the marriage ignorant of the facts alleged.

83. The question then arises whether either or both of these limitations should be extended to any of the other grounds on which a marriage will be voidable, *i.e.*, (*e*) incapacity to consummate, (*f*) wilful refusal to consummate, and (*g*) lack of consent. We can see no case for extending limitation (*b*)—ignorance at the time of the marriage. All the objections to its application to

[33] *Smith* v. *Smith* [1948] P. 77.
[34] *Stocker* v. *Stocker* [1966] 1 W.L.R. 190.
[35] Divorce Reform Act 1969, s. 3.

mental disorder apply equally strongly; once again knowledge should be relevant only as an essential element in the statutory bar replacing approbation. But serious consideration has to be given to a possible extension of the application of the three-year limitation.

84. The first question is whether it should apply to incapacity to consummate or wilful refusal to do so. If it were extended to them (and as we suggest later to lack of consent) all voidable marriages would be subject to the three-year time-limit and would thereafter become valid marriages terminable only by divorce. The weighty argument in favour of this proposal is that all uncertainty as to the status of the marriage would disappear after three years. Nevertheless, having examined this proposal, we do not favour it, our principal reasons being:

(*a*) The introduction of a three-year time-limit would in some cases place parties in a difficult situation. Some forms of impotence are incurable, but others, particularly if they are due to psychological causes, are curable or pass with time. Even if the impotence is incurable, this may not be known to one party (or to both) who, wanting the marriage to succeed, may continue to hope that consummation might be possible in time.

(*b*) Similarly, wilful refusal to consummate may be overcome by perseverance, as where a wife through frigidity or nervousness refuses to allow intercourse for a long period after marriage. Even after one party has come to realise that the non-consummation is due to the other's wilful refusal, it frequently happens that that party nevertheless still continues attempts to have the marriage consummated hoping that these efforts will eventually overcome the other party's reluctance. Such attempts by the aggrieved party are surely to be commended and should not be discouraged by an arbitrary time-limit, the effect of which would be to place the aggrieved party in the dilemma of electing between giving up his efforts to make a success of the marriage and taking his decree of nullity, or continuing his efforts and losing any chance of obtaining annulment.

(*c*) If after three years the marriage ceased to be voidable and could thereafter only be terminated by divorce, the aggrieved party who left the non-consummating spouse after the three years might be obliged to wait at least a further two years before petitioning for a divorce.[36] The practical result might be that a young man or woman, who continued his or her efforts to consummate the marriage beyond three years, would be unable to have the marriage terminated until about six years had elapsed from the date of marriage.

(*d*) If after three years (*i.e.*, after the marriage had ceased to be voidable), the aggrieved party left the impotent spouse, the aggrieved party would then be in desertion (since impotence is an illness which does not justify leaving the impotent spouse)[37] and after another two years[36] the impotent spouse would be able to divorce the aggrieved

[36] Under the Divorce Reform Act 1969 (which comes into force on 1 January 1971) it is necessary to wait two years under section 2(1)(*c*) (desertion) or 2(1)(*d*) (separation).
[37] See para. 56, fn. 95.

party. On the other hand, if the failure to consummate was due to wilful refusal, the aggrieved party could leave and allege that the other's behaviour was such that the aggrieved party could not reasonably be expected to live with him. In the result, if after the three years the aggrieved party left because the marriage had not been consummated but did not know whether the non-consummation was due to impotence or wilful refusal, he or she would be guilty of a matrimonial offence if the court found impotence to be the cause of non-consummation, but would be blameless if the court found the cause to be wilful refusal to consummate.

85. The same considerations do not apply, however, to applying the three-year time-limit to the ground of lack of consent. In our view, a view shared by a substantial majority of those we consulted, it should not be possible to avoid a marriage on this ground unless proceedings are brought within three years. The case for this is strongest when the absence of consent is due to mistake or duress. A party to such a marriage should decide as soon as possible whether to avoid it or to accept it as a valid marriage, and three years is more than sufficient in which to make such a decision. Where the absence of consent is due to unsoundness of mind it could be argued that it would be unfair to impose the time-limit since there might not be a recovery within the three years. We think, however, that even then there would be no serious risk of hardship since proceedings could be taken on the patient's behalf[38] within three years. Moreover, if a time-limit is imposed, as it already is, on proceedings to annul a marriage on the ground of mental disorder of a type unfitting for marriage, we think that there are obvious advantages in applying the same rule to unsoundness of mind which happens to deprive the party of his ability to consent. Many of the practical advantages of the rationalisation that we are striving to achieve would be destroyed if the time-limit, while applied to other forms of absence of consent and to other forms of insanity, did not apply to this.

86. We accordingly recommend that marriages voidable on the ground of lack of consent, mental disorder, venereal disease or pregnancy should not be avoided unless proceedings are instituted within three years of the marriage and that in the case of venereal disease or pregnancy it should also be necessary to establish that the petitioner at the time of the marriage was ignorant of the facts in question. We do not recommend that either rule should apply in the case of impotence or wilful refusal to consummate.

VII—ANCILLARY QUESTIONS

Parties to a Nullity Suit—Void Marriages

87. In the case of a void marriage, in addition to the spouses themselves, anyone with a sufficient interest in obtaining a declaration of nullity may petition; a slight pecuniary interest is sufficient[39] and anyone whose title to property would be affected, or on whom a legal liability might be cast by the

[38] Mental Health Act 1959, ss. 102, 103.
[39] *Faremouth* v. *Watson* (1811) 1 Phil. 355.

natural result of the marriage—the birth of issue—has a right to contest its validity.[40] In view of the fact that the nature of the pecuniary interest needed to give the petitioner the right to sue may be insignificant,[41] it is perhaps surprising that a relative's hope of inheriting on an intestacy, which could be defeated by a valid marriage, is apparently not a sufficient interest entitling the relative to contest the marriage during the spouse's lifetime.[42] But after the spouse's death the relative has such an interest if his right of succession is affected by the validity of the marriage.[43]

88. We have considered whether it would be possible to amend the law so as to exclude persons with insignificant interests from being able to petition. But it is difficult to see where the line could be drawn[44] and we think that the law should remain unaltered in this respect.

89. The respondent to the suit is the other spouse, or if the suit is brought by a third party[45] both spouses are respondents; in addition, any person may be given leave to intervene in the suit.[46] We have considered whether this position should be changed so that children of the union would have to be made parties. A decree declaring a marriage to be void affects the children of the spouses since they may be bastardised and perhaps lose rights of property[47] as a result of a finding that a marriage is void;[48] yet children are not given any notice of the proceedings and may not even know that proceedings are on foot. The children of a void marriage are legitimate if at the time of the act of intercourse resulting in the birth (or at the time of the marriage if later) one spouse or both reasonably believed that the marriage was valid.[49] Therefore, the issues determining whether a child is legitimate are: First, is the marriage valid? And, second, if the marriage is void, did the spouse or spouses reasonably believe it to be valid at the relevant time? As to the first issue, a decree of nullity is a judgment *in rem* which is, therefore, conclusive on the children. As to the second issue, a finding that the spouse had or had not the requisite belief could be binding only between the parties to the proceedings, namely, the spouses. However, if the court finds that one spouse or both had the requisite belief,[50] that would for practical purposes

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[40] *Ray* v. *Sherwood* (1837) 1 Moo. P.C. 353 at 399, 400.

[41] *Faremouth* v. *Watson, supra*; *Ray* v. *Sherwood* (1836) 1 Curt. 193 at 227; (1837) 1 Moo. P.C. 353 at 399, 400.

[42] *Ray* v. *Sherwood* (1836) 1 Curt. 193 at 225; but the Privy Council expressly left the point open: (1837) 1 Moo. P.C. 353 at 390; in *J.* v. *J.* [1953] P. 186, which was a niece's petition, the point was not decided as the neice attempted to petition as the wife's next friend and not in her own right.

[43] *Re Park* [1954] P. 112, C.A.

[44] In some countries persons with a moral interest can also petition: *e.g.*, in France: the ascendants or the family council, the lawful spouse in the case of bigamy by the other spouse, the public prosecutor; in West Germany: the lawful spouse in the case of bigamy and the public prosecutor; in Switzerland: a public authority.

[45] *Wells* v. *Wells & Cottam* (1863) 3 Sw. & Tr. 364.

[46] Matrimonial Causes Act 1965, s. 44.

[47] This is less likely since the Family Law Reform Act 1969.

[48] For an example of what can happen, see *Plummer* v. *Plummer* [1917] P. 163, C.A. where after a decree of nullity had been pronounced a guardian *ad litem* of the child of the marriage was appointed, the child was given leave to intervene for the purpose of appealing against the decree and the decree was rescinded on appeal.

[49] Legitimacy Act 1959, s. 2. A further prerequisite to legitimation is that the child's father must be domiciled in England at the child's birth, or, if the father died before birth, immediately before his death: *ibid.*

[50] See, for instance, *Collett* v. *Collett* [1968] P.482 at 493 where the court made this finding.

go a long way towards, if not be conclusive as, a finding of legitimacy. Similarly, if the court made a finding, albeit *obiter*,[51] that neither spouse had the requisite belief, such finding would presumably be a reflection of the evidence and would be a substantial obstacle to a subsequent legitimacy petition. But any such finding would be made on the basis of the spouses' evidence untested by cross-examination on the question of legitimacy (or, if the petition was undefended, completely untested) and, possibly, in the absence of other relevant evidence. Moreover, if the children were of tender years at the time of the nullity suit and if after reaching their majority they found it advisable to initiate legitimacy proceedings, their parents might by then not be available to give evidence. All this suggests that there is a case for making children parties to the nullity proceedings.

90. But there are arguments to the contrary:

(*a*) It is only in isolated cases that it is in the child's interest to be represented in the nullity suit and to put the parties (or the State, to the extent that the parties are legally aided) in every suit for nullity of a void marriage to the expense of adding the child as a party seems unnecessarily drastic. In the overwhelming majority of cases making the child a party would contribute nothing.

(*b*) Under the Matrimonial Causes Rule 108, the court may order that a child be separately represented; the court may then appoint the Official Solicitor or some other proper person to be the child's guardian *ad litem* with authority to take part in the proceedings on the child's behalf. This safeguard may be of particular importance in proceedings to annul a void marriage when the child's legitimacy may be affected.

91. With one exception (who thought Rule 108 gave the child sufficient protection) all who sent comments on our Working Paper No. 20 were in favour of the child always being separately represented (as, indeed, we ourselves were[52]). Nevertheless, we have, on reconsideration, come to the conclusion that in view of the paucity of cases in which a child would be prejudiced through not being separately represented, and in view of the court's power to order separate representation when appropriate, a provision that a child should be automatically made a party to every suit for nullity of a void marriage is unnecessary and we do not recommend it.

Parties to a Nullity Suit—Voidable Marriages

92. In the case of impotence no one other than one of the spouses is allowed to petition.[53] The general belief is that the same applies in the case of grounds other than impotence, and this view is supported by *obiter dicta* in the House

[51] It is difficult to see how it could be anything more, since legitimacy is not an issue in a nullity suit and a custody order can be made whether or not the children are legitimate.
[52] Working Paper No. 20, para. 67.
[53] *A.* v. *B.* (1868) L.R. 1 P. & D. 559; *Inverclyde* v. *Inverclyde* [1931] P. 29, 41; *Harthan* v. *Harthan* [1949] P. 115, 132.

of Lords.[54] The other spouse is respondent and the court has power (as it has in all matrimonial suits) to give third parties leave to intervene.[55]

93. We think that the position should remain as it now is, *i.e.*, the grounds of nullity, being treated as matters of personal complaint, only a spouse should be able to petition to have the marriage annulled and only during the lifetime of the other.[56] The other spouse should be the only respondent to the suit, though the court should retain its existing power to allow a third party to intervene or to order that the children be separately represented.[57] Where the marriage is voidable, as opposed to void, there is less need for special protection for the children since their legitimacy is unaffected.[58]

Combining declarations of validity and legitimacy

94. A further question which we have considered is whether nullity proceedings should be combined with proceedings for a declaration of the validity of the marriage, so that the result of the proceedings would be a declaration that the marriage is either annulled or is valid. If this were the practice and the same proceedings investigated the question of legitimacy of children, then the result would be to settle once and for all both the status of the marriage and the status of the children. In our Working Paper No. 20[59] we considered the possible advantages and disadvantages of combining the proceedings and we expressed the view that a compulsory combination would create more problems than it would solve, would needlessly complicate a nullity suit and would increase its cost. The views we have received from commentators are divided and we do not recommend any change in the law in this respect. There does not seem to be anything to stop a petitioner, under existing law, from seeking a decree of nullity and separately (in case he fails) a declaration that his marriage is valid, in which event the two petitions can be heard together or one immediately after the other.[60]

Scope of legislation

95. One of the confusing features of the law of nullity is that the grounds on which a marriage may be annulled have never been comprehensively set out in the statute law. Whereas practitioners can see by a glance at one statute (formerly the Matrimonial Causes Act 1965 and, after 1 January 1971, the Divorce Reform Act 1969) what are the grounds of and bars to a petition

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[54] *Ross-Smith* v. *Ross-Smith* [1963] A.C. 280 at 306, 348. Further, in the case of nullity on grounds set out in s. 9(1)(*b*), (*c*) and (*d*) (mental disorder, epilepsy, venereal disease and pregnancy by another) the limitations in s. 9(2), namely, that the court must be satisfied that the petitioner was ignorant of the defect at the time of the marriage and that no sexual intercourse took place after he discovered it, indicate that the legislature had in mind that no one but a spouse could be petitioner.

[55] Matrimonial Causes Act 1965, s. 44.

[56] And subject to any statutory time-limit: see Matrimonial Causes Act 1965, s. 9(2) and our proposal in paras. 79, 80.

[57] Matrimonial Causes Rule 108.

[58] Matrimonial Causes Act 1965, s. 11.

[59] Paras. 71–74.

[60] We are making a separate study of declarations of validity of marriage and other declaratory decrees and orders. Our preliminary view is that the present law could be improved and we hope to issue soon a Working Paper giving our provisional conclusions and inviting comments on them.

for divorce or judicial separation, this is impossible in the case of nullity which, as the foregoing discussion will have shown, is based partly on provisions in the Marriage Act 1949 and the Matrimonial Causes Act 1965 and partly on judge-made law. We accordingly recommend that as a step towards the complete codification of Family Law, which is our ultimate objective, the opportunity should be taken to state comprehensively when a nullity decree can be obtained. This is done in the Draft Bill in Appendix A.

VIII—SUMMARY OF RECOMMENDATIONS

96. Our recommendations can be summarised as follows:

(*a*) The law relating to nullity should be incorporated in a comprehensive statute setting out the grounds on which a marriage governed by English law is—

(i) void,

or (ii) voidable

and the bars to a petition: paragraph 95; see draft Bill in Appendix A.

(*b*) The substance of the law should remain unchanged except as provided in the following sub-paragraphs. In particular: a distinction should be maintained between void and voidable marriages (paragraph 4; see clauses 1 and 2 of the draft Bill); wilful refusal to consummate should continue to be a ground for nullity, not divorce (paragraphs 26–28; see clause 2(1)(*b*) of the draft Bill); under-age marriages should continue to be void and not be voidable or ratifiable (paragraphs 16–20; see clause 1(*a*)(ii) of the draft Bill) and there should be no additional grounds of nullity such as sterility (paragraphs 29–35).

(*c*) Lack of consent, whether due to unsoundness of mind, duress, mistake or otherwise, should render a marriage voidable, not void: paragraphs 11–15; see clause 2(1)(*c*) of the draft Bill.

(*d*) If it be the present law that a decree of nullity (as opposed to a declaration that there is no marriage) can be obtained if the parties prove to be of the same sex, we take the view that this should not be perpetuated as a ground for nullity: paragraphs 30–32; see clause 1 of the draft Bill which omits this ground.

(*e*) Mental disorder, whether continuous or intermittent, within the meaning of the Mental Health Act 1959 of such a kind and to such an extent as to render a party unfitted for marriage should be the only ground on which unsoundness of mind, not vitiating consent, should render a marriage voidable, and epilepsy should cease to be a ground of nullity: paragraphs 69–74 and clause 2(1)(*d*) of the draft Bill.

(*f*) Knowledge at the time of the marriage of the mental disorder should not in itself be a bar to nullity on this ground: paragraph 78; see clause 3(3) of the draft Bill which relates only to the grounds set out in clause 2(1)(*e*) and (*f*).

(*g*) Sexual intercourse after discovery of the defect should not in itself prevent the annulment of any voidable marriage: paragraph 81; see clause 3 of the draft Bill which omits this bar.

(*h*) The time-limit from the date of the marriage for petitioning to annul certain voidable marriages should apply to all petitions to annul a voidable marriage except those on the grounds of non-consummation through lack of capacity or wilful refusal, but should be extended to three years instead of the present one year: paragraphs 79, 80, 83–86; see clause 3(2) of the draft Bill.

(*i*) Collusion should cease to be a bar to nullity (and to a petition to presume death and to dissolve the marriage): paragraphs 37, 38; see clause 6 of the draft Bill.

(*j*) Instead of the common law bar of approbation there should be a clearly defined statutory bar applicable to all forms of voidable marriage: paragraphs 39–45; see clause 3 of the draft Bill.

(*k*) A decree of nullity of a voidable marriage should operate to annul the marriage only as from the date of the decree absolute: paragraph 25; see clause 5 of the draft Bill.

(*Signed*) LESLIE SCARMAN, *Chairman.*
CLAUD BICKNELL.
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.

J. M. CARTWRIGHT SHARP, *Secretary*
27 October 1970

APPENDIX A

Draft Nullity of Marriage Bill

ARRANGEMENT OF CLAUSES

Clause

DRAFT

OF A

BILL

TO

RESTATE, with certain alterations, the grounds on which a marriage is void or voidable and the bars to the grant of a decree of nullity on the ground that a marriage is voidable; to alter the effect of decrees of nullity in respect of voidable marriages; and to abolish certain remaining bars to the grant of matrimonial relief.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Grounds on which a marriage is void. 1949 c.76.

1.—A marriage which takes place after the commencement of this Act shall be void on the following grounds only, that is to say—

(*a*) that is not a valid marriage under the provisions of the Marriage Act 1949 (that is to say where—

(i) the parties are within the prohibited degrees of relationship;

(ii) either party is under the age of sixteen; or

(iii) the parties have intermarried in disregard of certain requirements as to the formation of marriage);

(*b*) that at the time of the marriage either party was already lawfully married.

Clause 1

1. As recommended in paragraph 95 of the Report, this clause and clause 2 codify the grounds on which, under English domestic law, a marriage is void or voidable. Neither clause deals with marriages the validity of which depends on the application of a foreign law: see clause 4(1). Nor does clause 1 prevent the English courts from declaring void a marriage which purports to have been celebrated abroad under the Foreign Marriages Acts or as a common law marriage but which does not comply with the requisite conditions: see clause 4(2). Both clauses apply to marriages taking place after the commencement of the Act.

2. Clause 1 sets out the four grounds on which in future marriages will be void. It accords with the present law, save as stated in note 3 below and save that absence of consent (which at present probably causes the marriage to be void) will in future render it voidable: see paragraphs 11–15 of the Report and clause 2(1)(*c*). The three grounds referred to in paragraph (*a*) are set out in the Marriage Act 1949. Grounds (a) (i) and (ii) can be clearly stated and are readily ascertainable: the prohibited degrees are set out in the Schedule to the Marriage Act (and see paragraph 49 of the Report) and non-age in section 2 of that Act. Ground (a) (iii) is perforce less explicit because, under the Marriage Act, the question whether failure to comply with the prescribed formalities renders the marriage void depends on the nature and extent of this failure and, in some circumstances, on the knowledge of the parties. The law in this respect is at present under review by a Working Party set up by the Registrar-General and the Law Commission and it is hoped that this review will lead to a much needed simplification of the present confusing position. Ground (*b*) codifies what is at present a common law ground.

3. For reasons stated in paragraphs 30–32 of the Report the fact that the parties prove to be of the same sex is not stated as a ground for nullity. This will mean that the decisions in *Talbot* v. *Talbot* (1967) 111 Sol. J. 213 and *Corbett* v. *Corbett* [1970] 2 W.L.R. 1306 are over-ruled and that the remedy in such circumstances will be a declaration under R.S.C. Ord. 15 r.16. As pointed out in paragraph 32 of the Report, if this result is not acceptable an additional paragraph will need to be added.

Grounds on which a marriage is voidable.

2.—A marriage which takes place after the commencement of this Act shall be voidable on the following grounds only, that is to say—

(*a*) that the marriage has not been consummated owing to the incapacity of either party to consummate it;

(*b*) that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it;

(*c*) that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;

(*d*) that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1959 of such a kind or to such an extent as to be unfitted for marriage;

1959 c.72.

(*e*) that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;

(*f*) that at the time of the marriage the respondent was pregnant by some person other than the petitioner.

Clause 2

1. This sets out the six grounds on which a marriage will be voidable. It preserves the present common law and statute law except as pointed out below.

2. Ground (*a*) is a common law ground. The law is unchanged.

3. Ground (*b*) repeats the statutory ground at present set out in section 9(1)(*a*) of the Matrimonial Causes Act 1965.

4. Ground (*c*) is at present probably a ground on which the marriage is void: see note 2 to clause 1. As a result of this section it becomes a ground on which the marriage is voidable. Except for the application to this ground of clause 3 the law is unchanged.

5. Ground (*d*) replaces the present statutory ground set out in section 9(1)(*b*) of the Matrimonial Causes Act 1965. For reasons set out in paragraphs 69–74 of the Report it re-words and simplifies section 9(1)(*b*) by deleting—

(*a*) sub-paragraph (i) which refers to "unsound mind",

(*b*) the reference to "the procreation of children" in sub-paragraph (ii), and

(*c*) the whole of sub-paragraph (iii), and

by making it clear that the mental disorder may be either continuous or intermittent. It should be noted that epilepsy ceases to be a ground: see paragraph 73 of the Report.

6. Grounds (*e*) and (*f*) repeat verbatim the statutory grounds at present set out in section 9(1)(*c*) and (*d*) of the Matrimonial Causes Act 1965.

7. The clause applies only to marriages taking place after the commencement of the Act. As regards existing marriages, the common law and section 9 of the Matrimonial Causes Act 1965 will continue to apply.

Bars to relief where marriage is voidable.

3.—(1) The court shall not grant a decree of nullity on any of the grounds mentioned in section 2 of this Act if the respondent satisfies the court—

(*a*) that the petitioner, with knowledge that it was open to him to have the marriage avoided, so conducted himself in relation to the respondent as to lead the respondent reasonably to believe that he he would not seek to do so; and

(*b*) that it would be unjust to the respondent to grant the decree.

(2) Without prejudice to subsection (1) of this section, the court shall not grant a decree of nullity on the grounds mentioned in section 2(1)(*c*), (*d*), (*e*) or (*f*) of this Act unless it is satisfied that proceedings were instituted within three years from the date of the marriage.

(3) Without prejudice to subsections (1) and (2) of this section, the court shall not grant a decree of nullity on the grounds mentioned in section 2(1)(*e*) or (*f*) of this Act unless it is satisfied that the petitioner was at the time of the marriage ignorant of the facts alleged.

(4) Subsection (1) of this section replaces, in relation to the grounds mentioned in section 2(1) of this Act, any rule of law whereby a decree may be refused by reason of approbation, ratification or lack of sincerity on the part of the petitioner or on similar grounds.

Clause 3

1. As recommended in paragraph 95 of the Report, this clause codifies the bars to a petition to annul a marriage voidable under clause 2. There are, of course, no bars to a petition under clause 1 since the marriage is void—except, at present, collusion which is abolished by clause 6(1).

2. Subsection (1) deals with the bar which replaces that of approbation. The definition of this bar accords with that laid down in the case law in respect of approbation, except that it omits any reference to conflicting with public policy, which, in some of the cases has been stated to be an essential prerequisite additional to injustice to the respondent and in others to be an alternative prerequisite. The new formulation will, it is hoped, remove the fears held by practitioners that if they advise their clients to do their best to resolve their differences they may thereby lead them to lose their remedy on the basis that they have approbated: see paragraph 44 of the Report.

3. Subsection (2) implements paragraphs 79–86 of the Report by imposing an additional bar in the case of petitions under clause 2(1)(*c*), (*d*), (*e*) or (*f*): *i.e.*, on all grounds of voidability other than incapacity to consummate or wilful refusal to consummate. The petition must be brought within three years of marriage. This replaces and extends section 9(2)(*b*) of the Matrimonial Causes Act 1965 under which the prescribed period is one year.

4. Subsection (3) replaces section 9(2)(*a*) of the Matrimonial Causes Act 1965 by imposing a further bar but in two cases only. For reasons stated in paragraph 78 of the Report, mere knowledge of the facts at the time of the marriage is no longer to be a bar to a petition on the ground of mental disorder (as it is under section 9(2)(*a*)). But, as at present, a petition on the ground of the respondent's venereal disease or pregnancy by another at the time of the marriage will be barred if the petitioner had knowledge of the facts at that time.

5. Subsection (4) makes it clear that the bars referred to in the clause are to be the only subsisting bars and that, in particular, there are to be no additional doctrines of "ratification" (see paragraphs 11–13 of the Report), "lack of sincerity" or the like (see paragraphs 39–45 of the Report). For reasons stated in paragraph 81, sexual intercourse after discovering the existence of grounds (*d*), (*e*) or (*f*) ceases to be a bar as it is at present under section 9(2)(*c*) of the Matrimonial Causes Act 1965.

6. This clause, being linked to decrees under clause 2, applies only to marriages taking place after the commencement of the Act. In respect of existing marriages, section 9(2) and the common law rules relating to approbation and ratification will continue to apply.

Marriages governed by foreign law or celebrated abroad under English law.

4.—(1) Where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales, neither section 1 nor section 2 of this Act shall—

(*a*) preclude the determination of that matter as aforesaid; or

(*b*) require the application to the marriage of the grounds there mentioned except so far as applicable in accordance with those rules.

(2) In the case of a marriage which purports to have been celebrated under the Foreign Marriages Acts 1892 to 1947 or has taken place outside England and Wales and purports to be a marriage under common law, section 1 of this Act is without prejudice to any ground on which the marriage may be void under those Acts or, as the case may be, by virtue of the rules governing the celebration of marriages outside England and Wales under common law.

Clause 4

1. As stated in paragraph 2 of the Report, the Bill codifies the English domestic law of nullity but does not attempt to deal with problems of conflict of laws. Accordingly, subsection (1) makes it clear that clause 1 or 2 does not preclude the English courts from determining the question of the validity of a marriage in accordance with the rules of a foreign country where our rules of private international law so require. This has a two-fold application. First, a marriage governed by foreign law may be valid notwithstanding that it would be void under clause 1 or voidable under clause 2 if it were governed by English law. For example, notwithstanding clause 1(*a*)(ii) it will be valid although one party was under the age of sixteen years if valid in the country where it was celebrated and by the law of the parties' domicil. Secondly, the marriage may be void or voidable if defective according to the law of the place where it was celebrated or that of the parties' domicil, notwithstanding that it would not be void or voidable under clause 1 or 2. This might be so, for example, where the applicable law had wider prohibited degrees, a higher minimum age or additional grounds of voidability.

2. Subsection (2) deals with a slightly different situation. In certain circumstances a marriage celebrated abroad may be valid if it complies with English law notwithstanding that it does not comply with the forms of the law of the place where it is celebrated. The first, and principal, example of this is a marriage under the Foreign Marriages Acts 1892 to 1947, *i.e.*, a British consular marriage or a marriage of a member of H.M. Forces serving abroad. Secondly, in exceptional circumstances (for example, where a member of the occupying forces marries in a conquered country) the marriage may be valid as a common law marriage by mere exchange of consents. In these cases it is English, not foreign, law which is applied extra-territorially. Subsection (2) merely makes it clear that in either of these situations the English court may declare a purported marriage to be void because the Acts have not been complied with or the circumstances did not permit of a common law marriage. This needs to be stated because clause 1(*a*)(iii) will not apply as there will have been no breach of the Marriage Act 1949 which does not extend to such marriages.

3. Note also clause 7(4) which says that nothing in the Act affects the law relating to the marriage of members of the Royal Family.

Effect of decree of nullity in case of voidable marriage.

5.—A decree of nullity granted after the commencement of this Act on the ground that a marriage is voidable shall operate to annul the marriage only as respects any time after the coming into operation of the decree, and the marriage shall, notwithstanding the decree, be treated as if it had existed up to that time.

Clause 5

1. This clause implements the recommendation in paragraph 25 of the Report. In the case of marriages which are voidable, a decree of nullity will in future end it as from the date of the decree absolute and not retrospectively. This will resolve the difficulties and confusion flowing from the existing case law: see paragraph 22 of the Report.

2. This section is deliberately worded so as to cover all decrees of nullity "on the ground that a marriage is voidable". Hence it will apply not only to cases where English domestic law codified in clause 2 applies but also to cases where the marriage is annulled because it is voidable under the applicable foreign law: see clause 4(1). Also it will apply to the annulment of existing marriages.

3. As pointed out in paragraph 25 of the Report, it would be desirable if the decree made it clear whether the marriage had been annulled because it was void or because it was voidable. At present the same formula (see paragraph 21 of the Report) is used in both cases although it is hardly apt where the marriage is voidable and will become still more inappropriate in future.

Collusion etc., not to be bar to relief in cases of nullity or under s.14 of Act of 1965.

6.—(1) Collusion shall cease to be a bar to the granting of a decree of nullity.

(2) It is hereby declared that neither collusion nor any other conduct on the part of the petitioner which has at any time been a bar to relief in matrimonial proceedings constitutes a bar to the grant of a decree under section 14 of the Matrimonial Causes Act 1965 (presumption of death and dissolution of marriage).

1965 c.72.

Clause 6

1. This implements the recommendations in paragraphs 37 and 38 of the Report.

2. Subsection (1) removes collusion as a bar to nullity; it applies whether the suit is to annul an existing marriage or a marriage taking place after the commencement of the Act. Collusion will, on 1 January 1971, cease to be a bar to divorce or judicial separation by virtue of the Divorce Reform Act 1969, section 9(3). But this does not apply to nullity and Schedule 2 of the 1969 Act expressly retains the references to collusion in sections 6 and 7 of the Matrimonial Causes Act 1965 in their relation to nullity (or dissolution on the ground of presumed death).

3. As recommended in paragraph 38, note 65, of the Report the opportunity has been taken to declare that neither collusion nor any other conduct on the part of the petitioner (*cf.* Divorce Reform Act 1969, section 9(3)) constitutes a bar to a dissolution of marriage under section 14 of the Matrimonial Causes Act 1965 on the ground that the respondent can be presumed to be dead. The words "other conduct on the part of the petitioner" would cover undue delay, the petitioner's adultery, cruelty and conduct conducing, conniving or condoning. By virtue of the Divorce Reform Act all of these cease to be bars to a divorce or judicial separation and should clearly not apply to dissolutions under section 14. Insofar as these bars are purely statutory they have presumably been abolished even in relation to section 14 because the relevant provisions of the Matrimonial Causes Act 1965 (section 5(1) to (4)) have been wholly repealed by the Divorce Reform Act 1969, Schedule 2. But some of them appear to be regarded as bars at common law also and as applying to proceedings which are purely statutory (as are those under section 14). Certainly Schedule 2 of the 1969 Act assumes that collusion may still be a bar to proceedings under that section: see 2 above. But, if as has been held (see *Deacock* v. *Deacock* [1959] P. 230, C.A.), proceedings under the section are "divorce" proceedings, that assumption appears to be wrong, for section 9(3) of the Act will have abolished it. In order to clear up the present obscurity, subsection (2) is expressed to be declaratory. Indeed, it is not obvious how, in truth, collusion or other conduct of the petitioner could ever be relevant in relation to a petition under section 14. If the petitioner is colluding with the respondent, *ex hypothesi* the latter is not dead and the petition should be dismissed on that ground. The petitioner's conduct seems immaterial in proceedings based on the respondent's presumed death—and delay, far from being culpable, is to be encouraged. It is true that it has been held that the petitioner's adultery requires disclosure in a discretion statement (*Gallagher* v. *Gallagher* [1963] 1 W.L.R. 808) and presumably, therefore, it would have been held to be a discretionary bar. But this places the petitioner in an impossible position; if he says that he is committing adultery he impliedly recognises that his spouse is alive which is precisely the opposite of what he seeks to establish. Hence, it seems to be safe and desirable to *declare* that collusion or other conduct of the petitioner is not a bar to proceedings under section 14.

Short title, consequential amendments and repeals, saving, commencement and extent. 1965 c. 72. 1945 c. 16

7.—(1) This Act may be cited as the Nullity of Marriage Act 1970.

(2) In section 40(1) (*a*) of the Matrimonial Causes Act 1965 (additional jurisdiction in proceedings under that Act by wife) after the words in brackets there shall be inserted the words "or under the Nullity of Marriage Act 1970"; and in section 2 of the Limitation (Enemies and War Prisoners) Act 1945, at the end of the definition of "statute of limitation", there shall be added the words "section 3(2) of the Nullity of Marriage Act 1970".

(3) The following provisions of the said Act of 1965 are hereby repealed, that is to say—

section 6(1) (*c*) as applied by sections 10 and 14;

in section 7, as applied by sections 10 and 14, the words from "either" to "collusion or";

section 9, except in relation to marriages taking place before the commencement of this Act.

(4) Nothing in this Act affects any law or custom relating to the marriage of members of the Royal Family.

(5) This Act shall come into force at the expiration of the period of one month beginning with the day on which it is passed.

(6) This Act does not extend to Scotland or Northern Ireland.

Clause 7

1. Subsection (2) makes two consequential amendments to other legislation. First, it provides that the ground of jurisdiction under section 40(1)(*a*) of the Matrimonial Causes Act 1965 (where the wife is petitioning and the husband deserted her or was deported when domiciled in England) shall be available in the case of nullity petitions under this Bill. This is necessary because, unlike the more important section 40(1)(*b*)—where the wife petitioner has been ordinarily resident in England for the immediately preceding three years—section 40(1)(*a*) does not refer generally to "proceedings for divorce or nullity" but only to proceedings under specified sections of the Act. Secondly, it amends the Limitation (Enemies and War Prisoners) Act 1945 by adding to section 2, a reference to clause 3(2) of this Bill. This has the effect of extending the period of three years from the marriage within which certain nullity petitions must be brought, so that time does not run while the petitioner or respondent was an enemy or detained in enemy territory or the period does not end until the expiration of one year from the time when he ceased to be an enemy or to be detained. A similar extension already applies to the corresponding provision (section 9(2)) of the Matrimonial Causes Act 1965.

2. Subsection (3) repeals section 6(1)(*c*) and part of section 7 of the Matrimonial Causes Act 1965. These provisions have already been repealed by the Divorce Reform Act 1969 except in relation to nullity and petitions under section 14 of the 1965 Act. It also wholly repeals section 9 of that Act (which the Bill will replace) *except in relation to existing marriages*. As regards existing marriages, the present law will continue to apply except as altered by clauses 5 and 6.

3. Subsection (4) says that nothing in the Bill affects any law or custom relating to the marriage of members of the Royal Family. This repeats the formula employed in section 79(5) of the Marriage Act 1949. Such marriages, wherever they take place, are governed by the Royal Marriages Act 1772 which, however, may not completely replace common law and customary rules.

4. Subsection (5) deals with the date of commencement. Since the main provisions of the Bill apply only to marriages taking place after the commencement of the Act there is no need to provide for a substantial period between passing and coming into operation. Indeed, that would be undesirable since the old law would then continue to apply to many more marriages. On the other hand, clauses 5 and 6 will apply to nullity proceedings in respect of existing marriages and, accordingly, it seems desirable to allow some time-lag in order that practitioners may be aware of the changes and that any necessary practice rules may be promulgated. Hence, the subsection provides that the Act shall come into force one month after its passing.

5. As subsection (6) says, the Bill extends only to England and Wales.

APPENDIX B

STATISTICS

NULLITY PETITIONS

	1964	1965	1966	1967	1968	1969	Average
Void Marriages	72	69	76	101	94	98	85
Voidable Marriages:							
Incapacity	133	146	146	155	148	163	148
Wilful Refusal	164	164	196	177	190	266	193
Incapacity and Wilful Refusal	453	499	530	496	497	516	498
Unsound Mind or Epilepsy	9	9	16	22	14	19	15
Pregnancy	16	21	23	33	24	12	22
Venereal Disease	0	3	12	3	4	8	5
Total	847	911	999	987	971	1082	966

NULLITY DECREES NISI

	1964	1965	1966	1967	1968	1969	Average
Void Marriages	58	70	70	60	76	78	69
Voidable Marriages:							
Incapacity	351	338	339	359	356	352	349
Wilful Refusal	295	327	318	316	356	389	333
Unsound Mind or Epilepsy	14	11	19	7	14	12	13
Pregnancy	10	13	14	19	14	11	14
Venereal Disease	0	3	4	3	3	1	2
Total	728	762	764	764	819	843	780

By way of comparison, in 1969 there were set down 60,134 petitions for divorce and there were made 54,151 decrees nisi of divorce.

Printed in England for Her Majesty's Stationery Office by J. W. Arrowsmith Ltd., Bristol
Dd 164317 K20 12/70